

# On the Fortieth Anniversary of the *Miranda* Case: Why We Needed It, How We Got It—And What Happened to It

Yale Kamisar\*

Last year (the year I gave the talk on which this article is based) marked the fortieth anniversary of *Miranda v. Arizona*,<sup>1</sup> one of the most praised, most maligned—and probably one of the most misunderstood—Supreme Court cases in American history. It is difficult, if not impossible, to evaluate *Miranda* without looking back at the test for the admissibility of confessions that preceded it.

## I. THE PRE-MIRANDA DUE PROCESS TEST

The pre-*Miranda* test for the admissibility of confessions was known as the due process “voluntariness” test. It was also called the “totality-of-the-circumstances” test because it took into account almost every factor involved in the case (for example, the intelligence, physical health and emotional characteristics of the particular suspect; his age, education and prior criminal record; how often he was fed, whether he was deprived of sleep, how long the police questioning lasted, whether relatives or friends had been turned away, and whether his request for a lawyer had been denied).<sup>2</sup> As Lawrence Herman has observed: “Under the ‘totality of the circumstances’ approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign.”<sup>3</sup>

In his *Miranda* dissent, Justice Harlan stoutly defended the due process/totality of the circumstances/voluntariness test.<sup>4</sup> But even he recognized

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\* Distinguished Professor of Law, University of San Diego; Clarence Darrow Distinguished University Professor Emeritus of Law, The University of Michigan. I am indebted to Joshua Dressler and Marc Spindelman for their helpful suggestions.

<sup>1</sup> 384 U.S. 436 (1966).

<sup>2</sup> See generally 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 440, 447–51 (2d ed. 1999) [hereinafter LAFAVE]. As Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 394 n.177 (2001) has noted, “both the vulnerabilities of the particular defendant and the level of offensiveness in the police tactics employed were relevant.”

<sup>3</sup> Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987). As Professor Herman adds, however, see *id.* at 745 n.96, in rare instances a single factor did “seem to have dictated the result” (citing *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 consecutive hours of interrogation); *Brown v. Mississippi*, 297 U.S. 278 (1936) (brutal physical force)).

<sup>4</sup> See, e.g., *Miranda*, 384 U.S. at 506: “[The cases utilizing the voluntariness test] show that

that "synopses of the cases [applying the voluntariness test] would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility."<sup>5</sup> Moreover, the values underlying the "voluntariness" and "coercion" rhetoric kept changing, as did the weight given to the various factors making up the "totality of circumstances." What made matters worse, "the Court usually never overruled a Due Process precedent."<sup>6</sup> It "simply ignored inconsistent cases, or distinguished them when necessary or convenient."<sup>7</sup>

Whatever meaning the terms "involuntary" or "coerced" confessions have acquired in modern times, for centuries the rule that a confession was admissible so long as it was "voluntary" or "uncoerced" was essentially an alternative statement of the rule that a confession was admissible so long as it was free of influences which made it untrustworthy.<sup>8</sup> As California Supreme Court Justice Roger Traynor has pointed out, however, as early as the 1940s, the "involuntary" confession cases "adumbrate[d] an enlarged test of due process transcending the simple one of untrustworthiness."<sup>9</sup> As the voluntariness test evolved over the years, and it became increasingly clear that the Supreme Court was taking into account the offensiveness of the tactics police interrogators utilized, as well as the trustworthiness of the confession these tactics produced, the concern that an "involuntary" or "coerced" confession was likely to be unreliable became less important. On the eve of *Miranda*, as Illinois Supreme Court Justice Walter Schaefer noted at the time, although the concern about unreliability "still exert[ed] some influence" in confession cases, "it [had] ceased to be the dominant consideration."<sup>10</sup>

When is a confession "freely" and "voluntarily" made and when is it not? When is it the result of a "free choice" or a "free will" and when is it the product of an "overborne" or "broken" will? Some who write about police interrogation and confessions, especially those with a philosophy background, find it hard to resist

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there exists a workable and effective means of dealing with confessions in a judicial manner."

<sup>5</sup> *Id.* at 508.

<sup>6</sup> Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2237 (1996).

<sup>7</sup> *Id.*

<sup>8</sup> See generally 2 LAFAYETTE, *supra* note 2, at 444-45; CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 226 (1954); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822 (3d ed. 1940).

<sup>9</sup> Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 665 (1966) (pre-*Miranda*). See also Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 235 (1959); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 418-19 (1954).

<sup>10</sup> WALTER SCHAEFER, THE SUSPECT AND SOCIETY 10 (1967) (based on lectures delivered before *Miranda*). "Indeed," added Justice Schaefer, "the Supreme Court has sometimes insisted upon the exclusion of confessions whose reliability was not at all in doubt." *Id.* at 10-11.

See also LAFAYETTE, *supra* note 2, at 445, noting that *Rogers v. Richmond*, 365 U.S. 534 (1961), "made certain what had been strongly intimated in several earlier cases, . . . namely, that the due process exclusionary rule for confessions (in much the same way as the Fourth Amendment exclusionary rule for physical evidence) is also intended to deter improper police conduct."

touching upon the free will/determinism debate.<sup>11</sup> But that has not been the level at which actual cases have been decided. Few, if any judges, I suspect, have pondered the questions philosophers have raised about “free will.” And no wonder: as Justice Jackson pointed out long ago, “in the sense of a confession to a priest merely to rid one’s soul of guilt,” *no* confession ever considered by the Supreme Court has been “voluntary.”<sup>12</sup> In another sense, however, as John Henry Wigmore observed long ago, *all* conscious verbal utterances are “voluntary” in the sense that “the situation is always one of choice between two alternatives—either one disagreeable, to be sure, but still subject to a choice.”<sup>13</sup>

I first grappled with the “voluntariness” test three years before *Miranda* was handed down. I was trying to figure out how the courts *really* arrived at the conclusion that a confession was, or was not, “coerced” or “involuntary.”<sup>14</sup> What the courts were really doing, I finally concluded, had little connection with what they were saying:

There is much talk in [Justice Frankfurter’s sixty-seven page opinion in *Culombe v. Connecticut* (1961)]<sup>15</sup> of “involuntariness” and the “suction process”; of “draining” the “capacity for freedom of choice”; of “overreaching,” “overbearing,” or “breaking” the “will.” But are these words and phrases any more illuminating than say, the talk of yesteryear about “affected with a public interest,” “subject to the exercise of the police power” or “devoted to the public use”? Is “involuntariness” or “coercion” or “breaking the will” (or its synonyms) little more than a fiction intended to vilify certain “effective” interrogation methods? Is “voluntariness” or “mental freedom” or “self-determination” (or its equivalents) little more than a fiction designed to beautify certain other interrogation techniques?<sup>16</sup>

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<sup>11</sup> See, e.g., Ronald J. Allen, *Miranda’s Hollow Core*, 100 Nw. U. L. REV. 71, 76–84 (2006).

<sup>12</sup> *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting).

<sup>13</sup> WIGMORE, *supra* note 8, § 824; see also Allen, *supra* note 11, at 77.

<sup>14</sup> Yale Kamisar, *What Is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963).

<sup>15</sup> Justice Frankfurter’s long opinion in *Culombe*, 367 U.S. 568, was the most ambitious attempt by any member of the Supreme Court to shed light on, and make sense of, the “involuntariness” test. But the reaction of Justice Frankfurter’s colleagues to his opinion only demonstrates the shortcomings of the test. Justice Harlan, joined by Justices Clark and Whittaker, shared Frankfurter’s view of the general principles that should govern the Court’s treatment of confession cases but reached the opposite result. Justice Douglas, joined by Justice Black, took a different route than did Frankfurter, but reached the same result. Chief Justice Warren, in the course of joining the separate concurring opinion of Justice Brennan, only said that he agreed with some of the general principles exonerated by Frankfurter, but not others. Only one member of the Court, Justice Stewart, joined in Justice Frankfurter’s dissertation.

<sup>16</sup> Kamisar, *supra* note 14, at 745–46. Three years later, and only three months before *Miranda* was decided, the Reporters for the American Law Institute’s MODEL CODE OF PRE-ARREST PROCEDURE project (Text Draft No. 1, 1966, p. 167) (citing Kamisar, *supra* note 14)

Moreover, I concluded, such words and phrases as “voluntariness,” “coercion,” and “breaking the will” were not even apt terms for the beginning of the solution of the confession problem. “For as Professor Paulsen has pointed out, they do not focus directly on either the risk of untrue confessions [or] the offensiveness of police interrogation methods.”<sup>17</sup>

To put it somewhat differently, as Professors Joshua Dressler and Alan Michaels recently have: Although Supreme Court opinions contain a good deal of language implying that “voluntariness” is an empirical issue, it “should be seen as presenting a normative question: how much, and what kind of, pressure placed on a person is morally permissible?”<sup>18</sup>

When he was Attorney General of the United States, Edwin Meese III, a harsh critic of *Miranda*, was fond of saying such things as, we didn’t have any need for *Miranda* for 175 years, or that we had gotten along well without *Miranda* for 175 years.<sup>19</sup> The truth of such assertions turns largely on what is meant by “we.” If one means that police officers bent on eliciting confessions or prosecuting attorneys determined to get the confession into evidence got along well with the “voluntariness” test, the statement is true. However, if “we” includes criminal suspects and their lawyers, it is not:

Although the amount of pressure to confess tolerated by the courts seemed to be steadily diminishing [as the test continued to evolve], the voluntariness test clearly did authorize considerable pressure. . . . [And because it did], suspects who were ignorant of their rights, unsophisticated about police practices and court procedures, easily dominated, or otherwise psychologically vulnerable were more likely to be on the losing end of a successful police interrogation.<sup>20</sup>

A good illustration of how the due process “voluntariness” test worked—or perhaps one should say, did *not* work, even in its advanced stage—is *Davis v. North Carolina*,<sup>21</sup> a case that arose shortly before *Miranda* was decided.<sup>22</sup>

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observed:

In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellant to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice.

<sup>17</sup> Kamisar, *supra* note 14, at 746 (referring to Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 429–30 (1954)).

<sup>18</sup> 1 JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 428–29 (4th ed. 2006).

<sup>19</sup> See Herman, *supra* note 3, at 741.

<sup>20</sup> Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871–72 (1981).

<sup>21</sup> 384 U.S. 737 (1966). At this point, I am drawing freely from a detailed discussion of the *Davis* case in Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 99–102 (1966).

In challenging the admissibility of his confession, Mr. Davis was more fortunate than most persons in his predicament. He could point to a specific notation on the arrest sheet that read: "Do not allow anyone to see Davis or allow him to use the telephone." (Rarely do police officials make a written declaration of their intent to hold a prisoner incommunicado.) Davis could also point to the uncontested fact that no one other than the police had spoken to him during the sixteen days of detention that preceded his confession. (The police conceded that they had questioned him about an hour a day for each of the sixteen days.)

Nevertheless, in the year 1960, Davis did not prevail in the intermediate and supreme courts of North Carolina. Nor, when he sought federal habeas corpus relief, did he fare any better in the federal district court in 1963 or in the United States Court of Appeals for the Fourth Circuit the following year.

In affirming his conviction, the North Carolina Supreme Court noted that Davis had been advised that he need not make a statement and that if he did it might be used against him. But the court neglected to point out that Davis was not advised of his rights until the sixteenth day of his detention—*after* he had confessed orally and just before he had signed the written confession.

How did the federal district court deal with the notation on the police blotter that nobody should be allowed to see Davis and that he not be permitted to communicate with the outside world? It made no mention of these aspects of the case in the course of concluding that Davis's confessions were "the products of a rational intellect and a free will."

How did the district and appellate federal courts deal with the testimony of Davis's sister that she tried to see her brother twice, but both times was turned back by the police? They did not believe her. Indeed, they believed the testimony of the police that they had tried their best to help Davis contact someone outside the prison walls.

The readiness with which the lower courts accepted police claims and the ease with which they rejected the defendant's versions of what happened was hardly likely to inspire confidence in the pre-*Miranda* test—from the defendant's point of view, at any rate.

To be sure, when Davis's case was finally reviewed by the United States Supreme Court, his conviction was overturned because it was found to be based on an "involuntary" confession. But Davis had a number of factors working for him that most people in his situation lack. He could point to a specific notation on his arrest sheet ordering him to be held incommunicado. He could also point to sixteen days of detention and interrogations. Moreover, he had been sentenced to

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<sup>22</sup> On the basis of his challenged confession, Davis was convicted of a capital offense in 1960. After being denied habeas relief in the federal district court and court of appeals, he prevailed in the U.S. Supreme Court—a week *after Miranda* was handed down. Because *Miranda* did not apply retroactively to the *Davis* case, the Court applied the due process "voluntariness" test and found the confession inadmissible under that standard.

death—and one time a death sentence may prove “helpful” (if in a perverse way) is when a defendant is seeking review of his case in the Supreme Court.

But in all the years the “voluntariness” test governed the admissibility of confessions, how fared the many defendants who lacked the helpful “objective facts” Davis could rely on? How fared the many defendants whose cases did not receive the special attention given to death penalty cases marked in red (as Davis’s case was)?

In the thirty years preceding *Miranda*, two-thirds of all the state confession cases the Supreme Court chose to review were death penalty cases. Even then, only one condemned person out of four had his case reviewed by the highest court in the land and only one out of eight obtained a reversal.<sup>23</sup> How many *non-capital* defendants whose involuntary confession claims failed below were likely to survive the winnowing process above? Virtually none.

Nineteen years after the Supreme Court overturned Davis’s conviction, it described his case as one where a confession had been “elicited from an impoverished, mentally deficient suspect who had been held incommunicado for 16 days with barely adequate nourishment.”<sup>24</sup> Yet, as noted earlier, the North Carolina courts and the lower federal courts believed that Davis’s confession had satisfied the “voluntariness” test. Moreover, two Supreme Court justices thought so, too.

Who were the justices? One was Tom Clark, who, dissenting in *Miranda*, had defended the “voluntariness” test as one “which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody.”<sup>25</sup> The other was John Harlan, who called the voluntariness test “an elaborate, sophisticated, and sensitive approach to admissibility of confessions.”<sup>26</sup> I venture to say that Justice Clark’s and Justice Harlan’s votes to uphold the admissibility of the confession in *Davis* speak louder than the kind words they had for the “voluntariness” test in their *Miranda* dissents.

The *Miranda* dissenters’ assurances about the due process “voluntariness” test notwithstanding, the test was too amorphous, too perplexing, too subjective and too time-consuming to administer effectively. As Justice Hugo Black remarked during the *Miranda* oral arguments,

If you are going to determine [the admissibility of the confession] each time on the circumstances . . . [if] this Court will take them one-by-one, and no court in the land can ever know [whether the confession is

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<sup>23</sup> See Kamisar, *supra* note 21, at 102–03 (*Defender Newsletter*, Nat’l Legal Aid and Defender Ass’n Sept. 1965); and BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 297–98, 305 (1961).

<sup>24</sup> *Miller v. Fenton*, 474 U.S. 104, 111 (1985) (O’Connor, J.).

<sup>25</sup> *Miranda v. Arizona*, 384 U.S. 436, 503 (1966) (Clark, J., dissenting in part).

<sup>26</sup> *Id.* at 508 (Harlan, J., dissenting). See also *supra* note 4 and accompanying text.

admissible], until [the case] comes to us . . . it is more than we are capable of doing.<sup>27</sup>

Looking back on the mid-1960s, Professor Geoffrey Stone observed: “Given the Court’s inability to articulate a clear and predictable definition of ‘voluntariness,’ the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload,” it seemed “inevitable” that the Court would seek a better way, a more manageable way, to deal with the confession problem.<sup>28</sup> Enter *Miranda*.

## II. WAS *MIRANDA* AN EXTREME RULING?

Two decades after *Miranda*, Gerald Caplan, one of the nation’s most eloquent and forceful critics of that landmark case, opined:

Whereas prior opinions defined the central problem in criminal constitutional law as striking the right balance between respect for the autonomy of the individual and concern for the protection of the general public, the Court in *Miranda* assumed a radical posture, treating the constitutional bar against compulsory self-incrimination as absolute . . . .

. . . . The [*Miranda*] Court wanted to place all the participants [in the police interrogation process] on equal ground. To accomplish this objective, the Court sought to provide counsel to the suspect before the police could take advantage of the suspect’s particular shortcomings. Thus, with one stroke, the Court boldly and improperly resolved the contradictions in the law of confessions by giving it a single focus—protection of the suspect.<sup>29</sup>

However, less than six months after Professor Caplan made these comments, in *Moran v. Burbine*,<sup>30</sup> a 6-3 majority of the Burger Court, per Justice O’Connor

<sup>27</sup> 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 894 (Phillip B. Kurland & Gerhard Casper eds., (1966)). See also DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE 71–72, 115 (2003).

<sup>28</sup> Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102–03. See also, e.g., Howe, *supra* note 2, at 393–94; Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1832–35 (1987); Schulhofer, *supra* note 20, at 869–70.

<sup>29</sup> Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1447, 1469 (1985).

<sup>30</sup> 475 U.S. 412 (1986). This case held that if a custodial suspect does not request a lawyer but, unbeknownst to him, a relative or friend retains a lawyer for him, the failure of the police to allow the lawyer to see the suspect or the failure to inform the suspect that an attorney is trying to reach him does not vitiate an otherwise valid waiver of *Miranda* rights. Although a goodly number

contradicted him:

[W]e think that [*Miranda*] as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights. . . .<sup>31</sup>

. . . .  
. . . *Miranda* attempted to reconcile these opposing concerns [the need for police questioning and the 'substantial risk' that the police will cross 'the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion'] by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning . . . could continue . . . , but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators. . . .<sup>32</sup>

. . . .  
. . . [R]ather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, [*Miranda*] embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests.<sup>33</sup>

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of law professors have criticized the result, I believed then, and still do, that the way *Burbine* viewed *Miranda*—a serious effort to strike a proper balance between police needs and individual rights—was more important than the *Burbine* Court's specific ruling. See Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS* 143, 150 (Herman Schwartz ed., 1987).

<sup>31</sup> *Burbine*, 475 U.S. at 424.

<sup>32</sup> *Id.* at 426–27.

<sup>33</sup> *Id.* at 433 n.4.

Since this paper was written, a new biography of Chief Justice Warren has been published: JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* (2006). Mr. Newton views *Miranda*

as a melding of [Warren's] deeper instincts—his unwillingness to shrink from action once convinced that action was called for and yet also his lifelong search for a middle where others saw no room for compromise. . . . Caught between those who demanded that only confessions given in the presence of a lawyer be admissible and those who argued any further restraints on police would only exacerbate crime, Warren chose—as he so often did—the middle, though undeniably a middle closer to the liberals than the conservatives.

*Id.* at 469.



It is now widely accepted that Justice O'Connor (and the other five justices for whom she spoke) was quite right.<sup>34</sup> And her observations came at a crucial time—a time when it was unclear whether *Miranda* would survive the Burger Court. Until Justice O'Connor wrote the opinion of the Court in *Burbine*, the Burger Court had had few kind words, if any, for *Miranda*. But characterizing *Miranda* as a case that “embodies a carefully crafted balance designed to fully protect both the defendant’s and society’s interests,” as the *Burbine* Court did, is the way *Miranda*’s defenders—not its critics—had talked about the case from the outset.

*Miranda* has to be read against the background of *Escobedo v. Illinois*,<sup>35</sup> a confession case handed down two years earlier. *Escobedo* extended the constitutional role of counsel to the pre-indictment stage, that is “when the process shifts from investigating to accusatory—when its focus is on the accused and its purpose is to elicit a confession”<sup>36</sup>—or when the process so shifts and one or more of the limiting facts in *Escobedo* are also present.<sup>37</sup>

*Escobedo* has an accordion-like quality. At some places the opinion seems to limit the holding to its specific facts. At other places, however, it launches such a broad attack on law enforcement’s reliance on confessions that it threatens (or promises) to eliminate virtually all police interrogation. At one point, for example, in the course of rejecting the argument that if a suspect were entitled to a lawyer prior to indictment or formal charge the number of confessions would be greatly reduced, the *Escobedo* Court retorted: “The fact that many confessions are obtained [during the pre-indictment stage] points up its critical nature as a ‘stage when legal aid and advice’ are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained.”<sup>38</sup> At another point, the Court observed:

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<sup>34</sup> See, e.g., Laurence Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. Q. 59, 161 (1989); Herman, *supra* note 3, at 736; Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 401–02, 403–04 (1999); Stephen Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 23 (1986); Stephen Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460 (1987). See also Dripps, *supra* note 27, at 55, 119. But cf. William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1264–68 (1988).

<sup>35</sup> 378 U.S. 478 (1964) (Goldberg, J.).

<sup>36</sup> *Id.* at 492.

<sup>37</sup> Among the factors present in *Escobedo* were the following: the suspect had retained his own lawyer; he had requested, but been denied, an opportunity to meet with his lawyer; the police interrogation had been aimed at eliciting incriminating statements; and the police had failed to warn the suspect of his constitutional right to remain silent. It was unclear whether all of these factors (or which of them) had to be present for the rule of *Escobedo* to be applicable. As a result, commentators disagreed greatly over what *Escobedo* meant. See YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 161–62 n.26 (1980).

<sup>38</sup> 378 U.S. at 488 (citation omitted).

We have learned the lesson of history . . . that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .

. . . No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these, rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, *then there is something very wrong with that system.*<sup>39</sup>

The sweeping language and broad implications of *Escobedo* greatly troubled, one might even say alarmed, most law enforcement officials and many members of the bench and bar. Thus, on the eve of *Miranda*, a case that was to reexamine *Escobedo* and to clarify its meaning and scope, the nation's most respected judges off the United States Supreme Court (Charles Breitel, Henry Friendly, Walter Schaefer and Roger Traynor) spoke publicly *in anticipation* of the Court's ruling and urged the Court to turn back or at least to reconsider where it was going.<sup>40</sup> Justice Schaefer, for example, voiced fear that "the doctrines converging upon the institution of police interrogation are threatening to push on to their logical conclusion—to the point where no questioning of suspects will be permitted."<sup>41</sup> And Judge Friendly warned that "condition[ing] questioning *on the presence of counsel* is . . . really saying that there may be no effective, immediate questioning by the police" and "that is not a rule that society will long endure."<sup>42</sup>

We shall never know whether or how long society would endure such a rule because the Warren Court never promulgated one. Whatever else it does do, *Miranda* does *not* condition custodial police questioning on the presence of counsel. It conditions it rather on the giving of certain warnings by the police and the obtaining of waivers of certain rights from custodial suspects. *Miranda* allows the police to obtain these waivers *without* the advice *or* the presence of defense

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<sup>39</sup> *Id.* at 489–90.

<sup>40</sup> See WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* (1967) (based on lectures delivered two months before *Miranda*); Charles D. Breitel, *Criminal Law and Equal Justice*, 1966 UTAH L. REV. 1; Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965); Henry J. Friendly, *Forty-Third Annual Meeting of the American Law Institute*, 1966 A.L.I. PROC. 250–52 (remarks of Judge Friendly); Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657 (1966). See also DRIPPS, *supra* note 27, at 74–78.

<sup>41</sup> SCHAEFER, *supra* note 40, at 9. See also Symposium, *Has the Court Left the Attorney-General Behind?*, 54 KY. L.J. 464, 521, 523 (1966) (pre-*Miranda*), where Justice Schaefer expressed the view that effective enforcement of the criminal law "is not compatible with a prohibition of station house interrogation or with the presence of a lawyer during station house interrogation."

<sup>42</sup> 1966 A.L.I. PROC., *supra* note 40, at 250 (emphasis added).

counsel. (Numerous studies establish that the great majority of persons advised of their rights fail to assert them. More about this later.)

Moreover, *Miranda* allows the police to obtain waivers from custodial suspects *without* the advice or presence of a judicial officer, and without the police having to videotape or audiotape—or make any objective record whatsoever—of the proceedings in the stationhouse. Evidently the *Miranda* Court was concerned that if it had explicitly required the police to make a recording of the crucial events it would have added fuel to the criticism that it was exercising undue control over law enforcement practices—that it was “legislating.” (Since *Miranda* was decided, four states have required their police to record the waiver transaction and subsequent questioning, but these states have done so on their own initiative.)

So, in view of all these aspects of *Miranda*, why was there what appears to be, in retrospect at least, such a great overreaction to the decision *Miranda*? In part, the answer is that the Court did not—as many law enforcement officials had hoped—limit the right to counsel to custodial suspects who could afford to have their lawyers or to those who asked for them on their own initiative. In this respect, the *Miranda* Court seemed to read *Escobedo* broadly.

Moreover, although it moved from a right-to-counsel framework to one based on the self-incrimination clause, the *Miranda* Court led (or should we say, misled?) a good number to believe it was “building on” and expanding *Escobedo*. At one point, for example, after defining “custodial interrogation”—“questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”<sup>43</sup>—the Court dropped an obfuscating footnote: “This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.”<sup>44</sup>

This footnote suggested that “custody” and “focus” were alternative grounds for requiring the warnings, but in actuality they are very different events and they have very different consequences.<sup>45</sup> The likely explanation for this footnote was the *Miranda* Court’s effort to appear to be maintaining some continuity with a much-publicized and much-criticized recent precedent. However, until the Court made clear that “focus” was irrelevant for *Miranda* purposes—and it took quite a while to do so<sup>46</sup>—the footnote only added to the confusion about the relationship between *Miranda* and *Escobedo*.

There was another factor at work. Although the *Miranda* Court did not hand down a ruling that many critics of *Escobedo* had anticipated and/or feared—it neither conditioned police interrogation *on the presence of counsel* nor required

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<sup>43</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>44</sup> *Id.* at 444 n.4.

<sup>45</sup> See Stone, *supra* note 28, at 149; Kenneth W. Graham Jr., *What is “Custodial Interrogation”?*, 14 UCLA L. REV. 59, 114 (1966); Yale Kamisar, *“Custodial Interrogation” Within the Meaning of Miranda*, in CRIMINAL LAW AND THE CONSTITUTION 335, 338–51 (1968).

<sup>46</sup> See *Beckwith v. United States*, 425 U.S. 341 (1976). See also *Stansbury v. California*, 511 U.S. 318 (1994) (*per curiam*).

that a suspect be advised of his rights by a defense lawyer or a disinterested magistrate—*neither did it turn back*.

The Court *did* “switch tracks”—moving from a right-to-counsel rationale (which threatened to culminate in a right not to confess except with the tactical assistance of counsel) to a self-incrimination rationale (which gave the police more room to maneuver)—but it continued to move in the same general direction as it had in *Escobedo*. However, many in law enforcement, politics and the media did not realize (or care) that *Miranda* was more police-friendly than *Escobedo*. They failed to realize or care that *Miranda* did not build on the thinking in *Escobedo* as much as it displaced it; they failed to realize or care that *Miranda* had turned away from the expansive language and far-reaching implications of *Escobedo*. To them the important point was that the Warren Court had not beat a *general retreat* from *Escobedo*. That was enough cause for criticism.

I do not believe that it can be said of *Miranda* (as it might be said of *Escobedo*) that it contains sweeping language indicating an unwillingness to accommodate law enforcement interests or that it saw no need to take into account the needs of the police. *Miranda* emphasized that a police officer was free to question persons without giving them any warnings so long as they were not in custody. Thus, although *any* questioning by a police officer *anywhere* generates *some* pressures and anxieties—“what on their face are merely words of request take on color from the officer’s uniform, badge, gun and demeanor,”<sup>47</sup>—the Court told us (as stated earlier) that the requisite warnings need not be given when the police engage in “general on-the-scene questioning” and need not (or, at least, need not always) be given when the police visit a suspect at his home or place of business.<sup>48</sup> For in these situations, “the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.”<sup>49</sup>

Moreover, a twelve-page section of the *Miranda* opinion<sup>50</sup> responds to the argument that “society’s need for interrogation outweighs the privilege [against self-incrimination].”<sup>51</sup> (No comparable section appears in the *Escobedo* opinion.) In this section Chief Justice Warren points out that although the standard FBI warnings to suspects at the outset of an interview have long included most of the requirements of what have come to be known as the *Miranda* warnings, the FBI “has compiled an exemplary record of effective law enforcement.”<sup>52</sup>

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<sup>47</sup> Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, in *POLICE POWER AND INDIVIDUAL FREEDOM* 29, 30 (Claude Sowle ed., 1962).

<sup>48</sup> See *Miranda*, 384 U.S. at 477–78. Indeed, pointed out the Court, “[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.” *Id.*

<sup>49</sup> *Id.* at 478.

<sup>50</sup> *Id.* at 479–91.

<sup>51</sup> *Id.* at 479.

<sup>52</sup> *Id.* at 483. The *Miranda* opinion discusses the FBI warnings at considerable length. *Id.* at 483–86. It should be noted, however, that, unlike the *Miranda* warnings, the FBI warnings only advised suspects who could not afford a lawyer. *Id.* at 486. Moreover, as dissenting Justice Harlan

In short, although *Miranda* did extend *Escobedo* in some respects, the *Miranda* opinion showed much greater awareness of, and sensitivity to, the needs of law enforcement than the *Escobedo* opinion had.

### III. EARL WARREN'S ROLE<sup>53</sup>

Although many critics of the Warren Court's criminal procedure rulings led the public to believe that Earl Warren and his colleagues were unworldly creatures who failed to grasp (and had no interest in grasping) the harm they were causing law enforcement, in Warren's case nothing could be further from the truth. Before becoming governor of California, Warren had spent his entire legal career in law enforcement: five as a deputy district attorney, thirteen as head of the Alameda County District Attorney's Office, and four as state attorney general. Warren had a more extensive background in law enforcement than anyone who has ever sat on the United States Supreme Court.

There seems to be general agreement among Warren's biographers that, as a result of his experiences as a prosecuting attorney, the feature of the criminal justice system that aroused his strongest emotions was the confession obtained during police custody. J. Francis Coakley, a former Warren deputy district attorney and Warren's successor as head of the Alameda County District Attorney's Office, has suggested that the seeds of Warren's *Miranda* opinion may have been his own understanding of the great imbalance between determined, resourceful interrogators (in homicide cases, at least, there are often more than one) and an isolated, disoriented suspect. Warren's own experiences as a prosecutor and an interrogator may have made him keenly aware of the opportunities for coercion in the custodial setting.

Another factor probably influenced Chief Justice Warren: that so many of the "involuntary" confession cases came from southern courts, and that so many of the defendants were powerless African-Americans cast them as "de facto civil rights cases." In fact, an early draft of Warren's *Miranda* opinion had called attention to the large number of black defendants who had been subjected to physical brutality by Southern police. (However, when Justice William Brennan sent him a memo suggesting that poverty more than race characterized the group who suffered police brutality, Warren deleted the reference to blacks and the South.)

Professor Bernard Schwartz, author of *Super Chief: Earl Warren and his Supreme Court*, quotes Justice Abe Fortas (a member of the 5-4 *Miranda* majority) to the effect that the *Miranda* decision was "entirely" Warren's.<sup>54</sup> At a conference

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pointed out, "there is no indication that the FBI agents must obtain an affirmative 'waiver' before they pursue their questioning." *Id.* at 521. See also the discussion in the text at note 55 *infra*.

<sup>53</sup> At this point, I am drawing freely from Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 23-30 (2005).

<sup>54</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 589 (1983).

held shortly before *Miranda* was decided, Warren emphasized that the standard FBI warnings were similar to the warnings he was proposing. (However, the FBI only advised suspects who could not afford a lawyer of the “availability” of such counsel from the judge, and a suspect might not see a judge for quite a while). According to one unidentified justice who attended the conference, the fact that the FBI was already giving suspects a set of warnings resembling what came to be known as the *Miranda* warnings may have been “the critical factor in the *Miranda* vote.”<sup>55</sup>

As a prosecutor, Warren was constantly trying to “professionalize” the police as well as his own deputies. As Chief Justice, he was confident that professional police officers could satisfy the more demanding standards his Court was requiring. Despite his critics’ claims that he and his colleagues were freeing too many criminals and threatening public safety, Warren viewed his Court’s rulings as enlightening law enforcement and encouraging the police to work harder and to prepare their cases more carefully and thoroughly. As noted by one of Warren’s biographers (and former law clerks), G. Edward White, Warren was convinced that his Court’s rulings were not hampering law enforcement, but “ennobling” it.<sup>56</sup>

To back up his argument that “compulsion” within the meaning of the privilege against compulsory self-incrimination can and does take place in the police station, Chief Justice Warren quoted extensively from various interrogation manuals.<sup>57</sup> He was criticized for that.<sup>58</sup> But because of the characteristic secrecy surrounding police interrogation, tapes or transcripts of the events taking place in the interrogation room in the cases before the Court were not available. The interrogation manuals were the “best evidence.” After all, these manuals had been written by those trained police interrogators or by those who themselves were or had been interrogators. In the kingdom of the blind, the one-eyed person is king.

Of course, Warren himself did not need to read any manuals to find out what went on in the interrogation room. When he observed that “the current practice of incommunicado interrogation is at odds with” the privilege against self-incrimination,<sup>59</sup> and that “an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner,”<sup>60</sup> he could have taken the stand and testified to that effect at considerable length. The same can be said when he noted that “the entire thrust of police interrogation [in *Escobedo*], as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment.”<sup>61</sup>

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<sup>55</sup> *Id.* at 589.

<sup>56</sup> G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 275 (1982).

<sup>57</sup> *Miranda v. Arizona*, 384 U.S. 436, 448–55 (1966).

<sup>58</sup> *See id.* at 499 (Clark, J., dissenting in part); *id.* at 532 (White, J., dissenting).

<sup>59</sup> *Id.* at 457–58 (majority opinion).

<sup>60</sup> *Id.* at 457.

<sup>61</sup> *Id.* at 465.

IV. THE QUESTION CHANGES FROM “HOW BADLY IS *MIRANDA* HARMING LAW ENFORCEMENT EFFORTS?” TO “DOES *MIRANDA*’S NEGLIGIBLE IMPACT DEMONSTRATE ITS FAILURE IN ELIMINATING THE ‘INHERENT COERCIVENESS’ OF POLICE INTERROGATION?”<sup>62</sup> OR “WHAT GOOD DOES *MIRANDA* DO?”

I think it fair to say that shortly after *Miranda* was decided most students of criminal procedure, whether defense-oriented or prosecution-oriented, would have shared the view of Professor A. Kenneth Pye: “In a few years we will be in a better position to assess the real significance of *Miranda*. If the fears of the dissenters prove justified, it may be necessary to reconsider whether society can afford the luxury of the values protected and implemented in the decisions.”<sup>63</sup> As it has turned out, however, with one conspicuous exception (Paul Cassell<sup>64</sup>), there is wide agreement that *Miranda* has had a negligible impact on the confession rate. A special committee of the American Bar Association’s Criminal Justice Section reported two decades ago that “[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement.”<sup>65</sup> This report, taken together with many earlier empirical studies indicating that *Miranda* posed no significant barrier to effective law enforcement, appeared to be, as the ABA Special

<sup>62</sup> This latter question is taken from an article by Peter Arenella. See *infra* text accompanying note 68.

<sup>63</sup> A. Kenneth Pye, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 199, 219 (1966). See also B.J. George, Jr., *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 193, 197–98 (1966): “If, as a result of *Miranda*, the rate of successful investigations, and thus the rate of convictions and pleas of guilty, markedly drops, the pressures toward amendment of the federal constitution will increase dramatically.”

<sup>64</sup> See the following articles by Professor (now Judge) Paul G. Cassell: *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) [hereinafter Cassell, *Social Costs*]; *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, 90 NW. U. L. REV. 1084 (1996); *Miranda’s “Negligible” Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J. L. & PUB. POL’Y 327 (1997) [hereinafter Cassell, *Negligible Effects*]. See also Paul G. Cassell & Bret Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

For strong criticism of Cassell’s statistics and conclusions, see John J. Donahue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998); Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 402–07 (1999); Stephen J. Schulhofer, *Bashing Miranda is Unjustified—and Harmful*, 20 HARV. J. L. & PUB. POL’Y, 347 (1997) [hereinafter, Schulhofer, *Bashing Miranda*]; Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Costs*, 90 NW. U. L. REV. 500 (1996) [hereinafter Schulhofer, *Practical Effect*]; George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A “Steady State” Theory of Confessions*, 43 UCLA L. REV. 933 (1996); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

<sup>65</sup> ABA Special Committee on Criminal Justice in a Free Society, *Criminal Justice in Crisis* 28 (1988).

Committee expressed it, “a strong repudiation of the claim that law enforcement would be greatly improved if *Miranda* were repealed or overruled.”<sup>66</sup>

As it became increasingly clear that *Miranda* was not having the significant adverse impact on law enforcement that many expected, a development occurred that would have astounded the *Miranda* dissenters: Not only did most commentators stop criticizing the landmark confession case for going too far, but a goodly number began complaining that it had not gone far enough.<sup>67</sup> For example, commenting on a sharp exchange between Paul Cassell, the most prominent critic of *Miranda*, and Stephen Schulhofer, one of *Miranda*’s staunchest defenders, Peter Arenella observed: “[If] Schulhofer is right (and I believe he is) that the *Miranda* regime has not impaired law enforcement’s ability to secure incriminating admissions, how exactly does *Miranda*’s negligible impact demonstrate its success in eliminating the ‘inherent coerciveness’ of police interrogation?”<sup>68</sup>

#### A. *The Weakening of the “Original Miranda”*

First of all, the “*Miranda*” that Professors Arenella and Schulhofer were talking about in the late 1990s—the *Miranda* that had survived the Burger Court-Rehnquist Court gauntlet—was a very different “*Miranda*” than the one that the *Miranda* Court had given us.<sup>69</sup> Because *Miranda* was the centerpiece of the Warren Court’s “revolution in criminal procedure” and the prime target of those who believed the Court was “soft” on criminals, almost everyone expected the so-called Burger Court to treat *Miranda* unkindly. It did so in a number of ways.

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<sup>66</sup> *Id.* See also George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004) and articles by Professors Donahue, Schulhofer & Thomas cited in note 64, *supra*.

<sup>67</sup> See, e.g., Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842–45 (1987); Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 109–10 (1989); Stephen J. Schulhofer, *supra* note 20, at 880–82.

The day *Miranda* was decided, some ACLU representatives did criticize *Miranda* on the ground that a suspect’s rights could not be fully protected unless a defense lawyer was present during police interrogation. See Leo & White, *supra* note 64, at 401. But these comments were drowned out by the hue and cry against *Miranda* from various law enforcement officials and various politicians.

<sup>68</sup> Peter Arenella, *Miranda Stories*, 20 HARV. J.L. & PUB. POL’Y 375, 377 (1997) (commenting on Cassell, *Negligible Effects*, *supra* note 64; and Schulhofer, *Bashing Miranda*, *supra* note 64.)

<sup>69</sup> Professors Leo and White have noted that “[a]s a result of the Burger and Rehnquist Court’s post-*Miranda* decisions, *Miranda* is no longer one case,” but rather a body of rules “impos[ing] less strict safeguards than the original decision.” Leo & White, *supra* note 64, at 407. I consider this an understatement.



The first blow the “new Court” dealt *Miranda* came in *Harris v. New York*,<sup>70</sup> holding that statements preceded by defective warnings, and thus inadmissible to establish the government’s case-in-chief, could nevertheless be used to impeach the defendant’s credibility if he took the stand in his own defense. (Thus, as the *Harris* dissenters pointed out, the defendant’s decision whether to take the stand “is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.”<sup>71</sup>) The Court recognized, but seemed unconcerned by, the fact that language in the *Miranda* opinion could be read as barring the use of statements obtained in violation of *Miranda* for any purpose.<sup>72</sup>

Four years later, in another case, *Oregon v. Hass*,<sup>73</sup> the Burger Court delivered a second blow, taking *Harris* a step further. After being advised of his rights, Hass asserted his right to counsel. Nevertheless, the police refused to honor his request for counsel and continued to question him. Under these circumstances, too, ruled the Court, the resulting incriminating statements could be used for impeachment purposes. Since many suspects waive their rights and make incriminating statements even after the receipt of complete *Miranda* warnings, *Harris* might have been explained—and contained—on the ground that permitting impeachment use of statements obtained without a full set of warnings would not greatly encourage the police to forget about the warnings. The police would still have a strong incentive to give them. If they did, there would still be a good chance the suspect might waive his rights and make a statement that could be used in the prosecution’s case-in-chief. But once a suspect asserts his rights, as he did in *Hass*, the police have very little to lose and much to gain by *continuing* to question him.<sup>74</sup>

Moving on to another aspect of *Miranda*, the police need only advise a suspect of his rights when they are about to subject a person to “custodial interrogation.” “[I]t is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation.”<sup>75</sup> When the

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<sup>70</sup> 401 U.S. 222 (1971). However, as indicated in *Harris*, and subsequently made clear in *Mincey v. Arizona*, 437 U.S. 385 (1978), “involuntary” or “coerced statements,” as opposed to those only in violation of *Miranda*, cannot be used for impeachment purposes. As pointed out in George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1089 (2001), *Harris* is “[t]he best example of the disconnect between *Miranda* and the Fifth Amendment” and “the very first case in which the [Burger] Court departed from *Miranda*’s bright line.”

<sup>71</sup> See *Harris*, 401 U.S. at 230.

<sup>72</sup> See *id.* at 224.

<sup>73</sup> 420 U.S. 714 (1975).

<sup>74</sup> The Court subsequently held that a defendant’s pre-arrest silence could be used to impeach him when he testified in his own defense, *Jenkins v. Anderson*, 447 U.S. 231, 240–41 (1980), and then, so long as he was not given the *Miranda* warnings, that even a defendant’s post-arrest silence could be used for impeachment purposes, *Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

<sup>75</sup> *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

circumstances are such that “there is no ‘*interplay*’ between police interrogation and policy custody,”<sup>76</sup> no warnings are required.

The Burger Court construed the key terms “custody” and “custodial interrogation” rather narrowly. For example, when, pursuant to a police request, a suspect goes to the police station on his own, or even when he “voluntarily” accompanies one or more police officers to the stationhouse, he may not be entitled to any *Miranda* warnings—despite the fact that he is being subjected to *police station questioning* designed to produce incriminating statements—because he may not be undergoing “*custodial* interrogation” within the meaning of *Miranda*.<sup>77</sup>

Moving on to still another aspect of *Miranda*, the “original opinion” emphasized that a statement would be admissible only if the government met its “heavy burden” of demonstrating that the suspect “knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”<sup>78</sup> The “original opinion” reminded us that the Supreme Court had “always set high standards of proof for the waiver of constitutional rights” and that it was “re-assert[ing] these standards as applied to in-custody interrogation.”<sup>79</sup> But establishing a valid waiver turned out to be a much less formidable feat than one would have supposed from reading the *Miranda* opinion.

Although “[t]he tone and language of the majority opinion in *Miranda* seemed to indicate that the Court would be receptive to nothing short of an express waiver of the rights involved,”<sup>80</sup> the post-Warren Court settled for less—far less. In *North Carolina v. Butler*,<sup>81</sup> the suspect said nothing when advised of his right to counsel and then refused to sign any waiver form. However, when asked to do so by the police, he expressed a willingness to talk to them. “An express written or oral statement of waiver” of rights, the *Butler* Court informed us, is not “necessary” to

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<sup>76</sup> *Id.* (quoting *Kamisar, Brewer v. Williams, Massiah and Miranda: What is “Interrogation”? When Does it Matter?*, 67 GEO. L.J. 1, 63 (1978)).

<sup>77</sup> See *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977). Cf. *Stansbury v. California*, 511 U.S. 318 (1994) (per curiam). See also *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (explaining at considerable length why the “roadside questioning” of a motorist detained pursuant to a traffic stop is “substantially less” “police-dominated” than stationhouse interrogation and thus should not be considered “custodial interrogation”). As Professor Leo has observed, the

police often redefine the circumstances of questioning so that the suspect technically is not in custody and therefore *Miranda* warnings are no longer required. Police recast what would otherwise be a custodial interrogation as a non-custodial interview by telling the suspect that he is not under arrest and that he is free to leave—sometimes even after detectives have transported the suspect to the stationhouse with the express purpose of questioning him inside the interrogation room and eliciting incriminating information.

Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1017 (2001).

<sup>78</sup> *Miranda*, 384 U.S. at 475.

<sup>79</sup> *Id.*

<sup>80</sup> 2 LAFAVE, *supra* note 2, at 580.

<sup>81</sup> 441 U.S. 369 (1979).

establish waiver; “in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated” after he received the warnings.<sup>82</sup>

As Justice William Brennan, the only member of the *Miranda* majority still on the Court, pointed out in his *Butler* dissent:

[The majority] shrouds in half-light the question of waiver, allowing courts to construct inferences from ambiguous words and gestures. But the very premise of *Miranda* requires that ambiguity be interpreted against the interrogator. That premise is the recognition of the “compulsion inherent in custodial” interrogation, and of its purpose “to subjugate the individual to the will of his examiner.” Under such conditions, only the most explicit waiver of rights can be considered knowingly and freely given. . . .

. . . .  
. . . Had [the officer] simply elicited a clear answer from [the defendant] to the question, “Do you waive your right to a lawyer?”, this journey through three courts would not have been necessary.<sup>83</sup>

As the *Butler* case itself illustrates, a suspect may make a “qualified” waiver, e.g., refuse to sign a waiver or object to any note-taking or tape-recording by an officer, but indicate a willingness to talk to the police. The Court explored the general problem in *Connecticut v. Barrett*,<sup>84</sup> where the suspect made it clear that he would not make a written statement outside the presence of counsel, but then orally admitted his involvement in the crime. The Court, per newly appointed Chief Justice Rehnquist, rejected the contention that the suspect’s expressed desire for counsel before making a written statement amounted to an invocation of the right to counsel.<sup>85</sup> The Court also dismissed the argument that the suspect’s conduct was “illogical” as “irrelevant.”<sup>86</sup>

Most lower courts had taken the position that the *Miranda* waiver of rights did not have to be express even before this view was adopted by the Supreme Court in *Butler*.<sup>87</sup> After *Butler* and *Barrett*, the lower courts took quite a relaxed view of how the prosecution could satisfy its “heavy burden” of demonstrating *Miranda*

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<sup>82</sup> *Id.* at 373.

<sup>83</sup> *Id.* at 377–79.

<sup>84</sup> 479 U.S. 523 (1987).

<sup>85</sup> *Id.* at 528–29.

<sup>86</sup> *Id.* at 530. However, I share the view of Professors LaFave, Israel and King that in these situations the suspect probably acted as he did because of a mistaken impression that an oral confession that was not contemporaneously recorded or transformed into a signed, written confession could not be used against him. Under these circumstances, therefore, “there is much to be said for the view that the police are under an obligation to clear up misunderstandings of this nature which are apparent to any reasonable observer.” 2 LAFAVE, *supra* note 2, at 593.

<sup>87</sup> See 2 LAFAVE, *supra* note 2, at 580.

rights waiver. "In practice," observed Mark Berger, "it appears that as long as the warnings are given and the suspect exhibits no overt signs of a lack of capacity to understand them, his waiver will be upheld."<sup>88</sup>

A decade later, after reading "hundreds of appellate opinions deciding whether the police complied with *Miranda*," George Thomas reported this "basic finding":

[O]nce the prosecutor proves that the warnings were given in a language that the suspect understands, courts find waiver in almost every case. *Miranda* waiver is extraordinarily easy to show—basically that the suspect answered police questions after he understood the warnings. The waiver process bears little resemblance to waiver of the Fifth Amendment privilege at trial where the prosecutor is not permitted to badger the defendant with requests that he take the witness stand. . . . [The] *Miranda* version of the Fifth Amendment permits waiver to be made carelessly, inattentively, and without counsel.<sup>89</sup>

Finally, no review, however brief, of the weakening or "downsizing" of the "original" *Miranda* case could fail to take notice of *Oregon v. Elstad*,<sup>90</sup> which declined to apply the "fruit of the poisonous tree" doctrine (commonly utilized in search-and-seizure cases) to violations of the *Miranda* warnings. Two police officers had gone to Elstad's home and, without administering *Miranda* warnings, obtained an incriminating statement from him. About an hour later, after being taken to the sheriff's office, Elstad was advised of his rights for the first time. He waived his rights and confessed to the crime. The state conceded that the first statement, the one made in Elstad's home, had to be excluded, but maintained that the statement Elstad made after being advised of, and waiving, his rights, should be admissible. A 6-3 majority of the Supreme Court agreed.

Although the *Elstad* opinion contains some sweeping language indicating that no evidence derived from a failure to give the warnings would be excluded,<sup>91</sup> the case could also be read narrowly. The derivative evidence in *Elstad* was a "second confession" and at one point the *Elstad* majority seemed to cast its holding in terms of a suspect's freedom to decide his own course of action.<sup>92</sup> Thus, one could plausibly argue, as dissenting Justice Brennan did, that the *Elstad* Court relied on "individual volition" as an insulating factor in successive confession cases<sup>93</sup>—a

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<sup>88</sup> Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1063 (1988).

<sup>89</sup> Thomas, *supra* note 70, at 1082.

<sup>90</sup> 470 U.S. 298 (1985).

<sup>91</sup> See *id.* at 309.

<sup>92</sup> See *id.* at 309, 313.

<sup>93</sup> See *id.* at 347 n.29.

factor altogether missing in the context of nontestimonial or inanimate evidence such as drugs, the proceeds from a bank robbery, or a weapon.

Because expert interrogators have long recognized, and instructed, that confessions are “the prime source of other evidence,”<sup>94</sup> *Elstad* posed a serious threat to *Miranda*—especially if read broadly—which is the way the lower courts immediately began reading it. It took twenty years for the Supreme Court to clarify the meaning and scope of *Elstad*.<sup>95</sup> In the meantime, “federal and state courts . . . almost uniformly ruled that the prosecution [could] introduce nontestimonial fruits of a *Miranda* violation in a criminal trial.”<sup>96</sup>

I very much doubt that in deciding such cases as *Elstad* and *Hass* the post-Warren Court intended or contemplated that police officers would exploit these exceptions by failing to give the *Miranda* warnings or disregarding them purposefully and deliberately,<sup>97</sup> but, as Charles Weisselberg has pointed out, “the evidence now shows that many [officers] receive training to do just that.”<sup>98</sup> “In California and to a certain extent in other states, police have developed the tactic of questioning ‘outside *Miranda*,’ [meaning] questioning over a suspect’s direct and unambiguous assertion of Fifth Amendment rights.”<sup>99</sup> For example, a California police training videotape discloses the following “instruction” by an Orange County Deputy District Attorney:

[I]f you get a statement “outside *Miranda*” and [the suspect] tells you that he did it and how he did it . . . we can use [that] to impeach or to rebut. . . . [I]f the defendant [then] gets on the stand and lies and says something different, we can use his “outside *Miranda*” statements to impeach him . . . .

The *Miranda* exclusionary rule . . . doesn’t have a fruits of the poisonous tree theory attached to it the way constitutional violations do. . . . [When we question someone who has invoked his *Miranda* rights] [a]ll we lose is the statement taken in violation of *Miranda*. We do not lose physical evidence that resulted from that. We do not lose the

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<sup>94</sup> C. O’HARA & G. O’HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 131 (5th ed. 1980). See also AUBRY & CAPUTO, *CRIMINAL INTERROGATION* 206 (3d ed. 1980); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 712 n.176 (1968); David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 845 (1992).

<sup>95</sup> As it turned out, the Supreme Court ultimately agreed with the lower courts’ expansive reading of *Elstad*. See discussion of the 2004 *Miranda* “poisonous tree” cases in the text at notes 184–88, *infra*.

<sup>96</sup> Wollin, *supra* note 94, at 835–36.

<sup>97</sup> In *Hass*, the Court dismissed this concern as a “speculative possibility.” See *Oregon v. Hass*, 420 U.S. 714, 723 (1975).

<sup>98</sup> Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 188 (1998).

<sup>99</sup> *Id.*

testimony of other witnesses that we learned about only by violating his *Miranda* invocation.<sup>100</sup>

It is highly likely that the cumulative effect of cases like *Butler*, *Elstad*, *Harris* and *Hass* contributed significantly to the softening of *Miranda*'s impact. If so, this can hardly be attributed to the original version of *Miranda*.

*B. Did the Police "Adapt to" Miranda or Did They Disregard It?*

In 1988, after persuading the Baltimore police department to grant him unlimited access to the city's homicide unit for a full year, David Simon, a *Baltimore Sun* reporter, took a leave of absence from the *Sun* and followed one shift of detectives as they traveled from interrogations to autopsies and from crime scenes to hospital emergency rooms. His 1991 book, *Homicide: A Year on the Killing Streets*,<sup>101</sup> was the result.

How, despite *Miranda*, do the Baltimore police manage to get so many custodial suspects to make incriminating statements? According to Simon, the following occurs: After the detective reads the *Miranda* warnings and the suspect responds that he understands them, but *before* the suspect is asked whether he wants to waive his rights and talk about the case,

the detective assures the suspect that he will honor his rights if he invokes them, but in the next breath warns him that asserting his rights would make matters worse for him. For it would prevent his friend, the detective, from writing up the case as manslaughter or perhaps even self-defense, rather than first degree murder. The detective emphasizes that he is affording the suspect the opportunity to tell his side of the story.<sup>102</sup>

Once he walks out of the room, the detective warns the suspect, "any chance you have of telling your side of the story is gone."<sup>103</sup> "In a typical case," Simon tells us, "the detective also tells the suspect (falsely)" that the evidence against him

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<sup>100</sup> *Id.* at 191-92. The full transcript of the videotape is reprinted in an appendix to Professor Weisselberg's article. *See id.* at 189-92. At the time this videotape was made, it was not clear that physical evidence discovered as a result of a failure to comply with *Miranda*, as well as the testimony of witnesses whose whereabouts were learned only by violating the *Miranda* warnings, could be used by the prosecution. As it turned out, the deputy district attorney proved to be correct. *See infra* text accompanying notes 184-88.

<sup>101</sup> DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 595 (1991). Mr. Simon had spent four years on the police beat before undertaking his extensive study of the city's homicide beat. In an author's note, Simon tells us that his book is a "work of journalism" and that the events he has written about "occurred in the manner described."

<sup>102</sup> Yale Kamisar, *Killing Miranda In Baltimore: Reflections on David Simon's Homicide*, 2 JURIST 1 (1999) (book review), available at <http://jurist.law.pitt.edu/lawbooks/revfeb99.htm>.

<sup>103</sup> *Id.*

is so overwhelming that he does not need any information from him; he only wants “to make sure that there ain’t nothing you can say for yourself before I write it all up.”<sup>104</sup> The detective also suggests that the suspect might have acted in self-defense. At this point, according to Simon, the suspect frequently becomes so eager to tell his story that the detective has to “cut him off” until “some paperwork” is completed—the signing of the “waiver of rights” form.<sup>105</sup>

It is unclear whether Baltimore detectives (or police interrogators from other cities who use similar tactics) think their methods can be reconciled with *Miranda*. There is reason to believe that Mr. Simon thinks (as do many members of the Baltimore police unit) that they can be.<sup>106</sup> (More about this shortly.)

The academic writings of Richard Leo and Welsh White essentially corroborate David Simon’s account. Thus, in one article, based on 200 police interrogations he observed in more than nine months, Professor Leo reports:

Most commonly, detectives tell suspects that there are two sides to every story and that they will only be able to hear the suspect’s side of the story if he waives his rights and chooses to speak to them. Detectives may emphasize that they already know the victim’s side of the story, implying that the victim’s allegations will become the official version of the event unless the suspect speaks. The detective might add that the prosecutor’s charging decision will be influenced by what the detective tells the prosecutor, which in turn is based on what the detective knows about the suspect’s side of the story.<sup>107</sup>

In a more recent article,<sup>108</sup> drawn from “numerous interrogation transcripts collected over the past twelve years,” Professors Leo and White inform us that “[p]erhaps the most common strategy employed by interrogators seeking *Miranda* waivers is to de-emphasize the significance of the required warnings.”<sup>109</sup> They then tell us, quoting with apparent agreement David Simon’s observation that “[t]he fraud that claims it is somehow in a suspect’s interest to talk with police will forever be the catalyst in a criminal interrogation,”<sup>110</sup> that “one of the most

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See SIMON, *supra* note 101, at 200.

<sup>107</sup> Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 664 (1996). The author of a recent study of sixteen- and seventeen-year old Minnesota juveniles charged with felony-level offenses who waived their *Miranda* rights reports that his study is “remarkably congruent with Leo’s observations of police interrogation of adults.” Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Police and Practice*, 97 J. CRIM.L. & CRIMINOLOGY 219, 315 (2006).

<sup>108</sup> Leo & White, *supra* note 64, at 412.

<sup>109</sup> *Id.* at 433.

<sup>110</sup> *Id.* at 435 n.189 (quoting SIMON, *supra* note 101, at 201).

powerful de-emphasizing strategies involves focusing the suspect's attention on the importance of telling his story to the interrogator." Leo and White continue:

The interrogators communicate to the suspect that they want to hear his side of the story, but they will not be able to do so until the suspect waives his *Miranda* rights. An interrogator employing this strategy will typically begin with some discussion of the case against the suspect. . . . When effectively employed, this strategy will often have the effect of totally undermining the *Miranda* warnings' effect. As in [one case the authors discuss at length], the suspect becomes so eager to tell his side of the story that he views the warnings as a needless impediment to his goal.<sup>111</sup>

Still another strategy, and one often used in combination with the earlier tactic mentioned, report Leo and White, "is to create the appearance of a non-adversarial relationship between the interrogator and the suspect."<sup>112</sup> An interrogator posing as the suspect's friend or confidant will often get the suspect to "view the *Miranda* warnings as insignificant."<sup>113</sup> This strategy, continues Leo and White, "not only de-emphasizes the *Miranda* warnings but may also suggest to the suspect that waiving his *Miranda* warnings will be to his advantage."<sup>114</sup> For the statements he makes to the interrogator, his "friend," "will be used to alleviate his difficulty."<sup>115</sup>

Professors Leo and White often discuss how police officers have "adapted" to *Miranda*.<sup>116</sup> Indeed, the first three words of the title of their article are "Adapting to *Miranda*." "Adapting" or "adjusting" are nice words, but I do not think they are the right ones. The more accurate words, I submit, are "circumventing," "evading," or "disregarding" *Miranda*.<sup>117</sup> Indeed, if Simon's and Leo and White's descriptions of the police responses to *Miranda* are representative of what is going on in America's interrogation rooms, it would be no exaggeration to say that in a significant number of instances, law enforcement officers are making a mockery of *Miranda*.

One of the principal purposes of the four-fold warning is, quoting from the "original *Miranda*," "to make the individual more acutely aware that he is faced

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<sup>111</sup> Leo & White, *supra* note 64, at 435-36.

<sup>112</sup> *Id.* at 438.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 439.

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g., id.* at 400, 414, 470.

<sup>117</sup> In a more recent article, Professor Leo has recognized that, because many of the detectives' strategies he had described in earlier studies "amount to interrogation" before obtaining *Miranda* waivers, they are "clearly a violation of both the letter and the spirit of *Miranda*." Leo, *supra* note 77, at 1019 (citing Yale Kamisar, *Reflections, Special: Retrospective on David Simon's Homicide*, 2 JURIST 1, Feb. 1999).



with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.”<sup>118</sup> But many of the cases described by Mr. Simon and Professors Leo and White seriously undermine this purpose by leading (or should one say, misleading?) the suspect into believing that it is in his best interest to waive his rights and talk to his “friends” in the interrogation room, his “protectors” against the detectives’ heartless superiors and the zealous prosecutor, who will charge the suspect with first degree murder unless the suspect tells his “friends” his side of the story.

*Miranda* warns that:

any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.<sup>119</sup>

But the very police conduct that *Miranda* is supposed to forbid seems to be occurring in the police stations of Baltimore, the unidentified California cities Leo and White studied, and other jurisdictions.<sup>120</sup>

The police *are* threatening the suspect: they are telling him that unless he talks to them about the homicide they will write it up as first degree murder. They *are* tricking the suspect: they are giving him the false impression that it is in his best interest to tell them his side of the story. Indeed, they are pretending that it is the suspect’s only chance to get the murder charge reduced (or maybe even dismissed).

Whatever deception, seduction and trickery a police interrogator may be able to utilize *after* the suspect effectively waives his rights and agrees to talk (and, amazingly, forty years after *Miranda*, what the interrogator may do at this stage is still unclear), the police cannot resort to any of these tactics *before* the suspect is asked whether he wants to waive his rights. The police cannot “condition” or persuade the suspect to waive his rights.

According to Simon, Leo and White, in a significant number of instances, what the police are doing *in effect* is explaining to the suspect (or persuading him) why it is in his best interest to talk to them and why it will be so much the worse for him if he decides not to do so. I do not think it an exaggeration to say that in a significant number of cases, the police, in effect, are *talking the suspect out of asserting* his rights *before* the “waiver of rights” transaction ever takes place.

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<sup>118</sup> *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

<sup>119</sup> *Id.* at 476.

<sup>120</sup> See, e.g., Peter Carlson, *You Have the Right to Remain Silent . . . ; But in the Post-Miranda Age, the Police Have Found New and Creative Ways to Make You Talk*, WASH. POST, Sept. 13, 1998, at 6–11, 19–24 (based largely on interviews with police interrogators from Washington, D.C. and surrounding Maryland and Virginia suburbs).

There is no phase of the criminal process known as the “pre-waiver of rights” stage, during which time custodial suspects are “conditioned” or “conned” into waiving their rights *before* being asked whether they want to assert them. The assertion of rights or their waiver is supposed to occur shortly after the curtain goes up—not postponed until the second or third act.<sup>121</sup>

By now the tactics Mr. Simon, Professors Leo and White, and others have described are probably widespread.<sup>122</sup> If so, it is no wonder that *Miranda* has only had a negligible effect on confession rates. But the “original *Miranda*” can neither be given the credit nor the blame for this state of affairs.

The current situation, rather, appears to be largely attributable to the fact that modern police questioning has become “an elaborate ‘confidence game,’ in which the detective subtly establishes rapport with his ‘mark,’ presents himself as the suspect’s ally, and dupes the suspect into believing that he can help himself by letting out a portion of the facts.”<sup>123</sup> However, as I have tried to show, the “new way” of police questioning (although better than the pre-*Miranda* ways in some respects) cannot be reconciled with *Miranda*.

We cannot establish that the “original *Miranda*” was basically flawed by pointing to empirical studies showing that many police interrogators have not been implementing *Miranda*, but rather, have been violating *both* its letter *and* spirit. However, we *can* fault the “original *Miranda*,” for something else (even if one can understand why it took that course of action): the failure to require the police to make an objective record of the proceedings in the interrogation room.

### C. *The Need to Record the Proceedings in the Interrogation Room*

Even if police interrogators had resorted to some of the aforementioned “confidence game” tactics that I believe are irreconcilable with *Miranda*, in the typical case, a prosecutor would still be in a strong position to resist a challenge to the admissibility of a resulting confession, for she would be armed with a signed waiver-of-rights form (and a signed explanation-of-rights form as well). Moreover, it would hardly be surprising if the detective(s) involved in the case fudged the truth about, or conveniently failed to remember, how the suspect was induced to sign the forms he did.

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<sup>121</sup> In fairness to those who conducted the empirical studies, however, they were focusing on *how* the police were responding to *Miranda* and *what* strategies they were in fact utilizing, not the legality or propriety of their tactics. Moreover, not all the strategies employed by police interrogators were inconsistent with *Miranda*; a number, to use Professor Leo’s phrase, “straddle[d] the ambiguous margins of legality.” Leo, *supra* note 107, at 665.

<sup>122</sup> Mr. Simon studied the strategies of Baltimore detectives and Professors Leo and White described those utilized in several California cities. But, there is no reason to think these jurisdictions are unique. See *supra* text accompanying note 117. Moreover, it is fair to assume that law enforcement officials, like members of other professions, communicate with each other.

<sup>123</sup> Schulhofer, *Practical Effect*, *supra* note 64, at 561–62 (summarizing the findings of a comprehensive empirical study of police questioning by Professor Richard Leo).

If all the facts were known in at least some of the “confidence game” tactics cases discussed earlier—if, for example, the entire proceedings had been videotaped or otherwise recorded—I submit that no court could or would admit the challenged statement unless it was prepared to overrule *Miranda* itself.

Mr. Simon’s and Professors Leo and White’s graphic descriptions of how detectives go about getting custodial suspects to make incriminating statements underscore the need to record the entire proceedings in the stationhouse: the conversations, if any, leading up to the warning of rights and the waiver of rights; the warnings and waiver transactions themselves; and any subsequent conversation. It is astonishing that despite the fact that “[t]he need for video-and audio taping is the one proposition that wins universal agreement in the *Miranda* literature,”<sup>124</sup> only four states require law enforcement officials in certain cases (usually homicide investigations) to make an audio or videotape of all the facts of police “interviews” or “conversations” with a suspect—including how the warnings are delivered and how waivers of rights are obtained.<sup>125</sup> (But if you were a detective who utilized “confidence game” tactics, would you be in favor of a tape-recording requirement, one that reveals what really happens in the “interview” room?)<sup>126</sup>

<sup>124</sup> William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 981 n.19 (2001). See generally William A. Geller, *Videotaping Interrogation and Confessions*, in THE MIRANDA DEBATE: LAW JUSTICE, AND POLICING 303 (Richard A. Leo & George C. Thomas III eds., 1998); JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 116, 121 (1993); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 129–37 (1980); Cassell, *Social Costs*, *supra* note 64, at 486–97 (arguing that a recording requirement should be an *alternative* to *Miranda*); Stephen A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois’ Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337 (2001); Leo, *supra* note 107, at 681–92. For the view that there are several constitutional grounds for requiring police interrogations to be taped, see Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003).

<sup>125</sup> The four states are Alaska, Illinois, Minnesota, and New Jersey. See generally YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, MODERN CRIMINAL PROCEDURE 637–42 (11th ed. 2005 & Supp. 2006).

<sup>126</sup> I am often asked whether police interrogators can circumvent a recording requirement by turning on the tape late or turning it on and off or tampering with the recording. I must confess that I am “technologically-challenged,” but according to the literature, measures can be taken to prevent evasions. For example, only a year after *Miranda* was decided, two former federal prosecutors who favored the recording of police questioning commented:

Procedures for the early deposit of tapes into court, and other safeguards against tampering with the record should be relatively simple to devise and should foreclose all but the most extreme and unlikely kinds of police misconduct. When sound recording is supplemented by visual records, such as photographs and visual tapes, by time stamps and other written records, its usefulness and reliability is even further increased. It may be that bringing recording devices into interrogation situations and requiring their continued use during the period of pre-arraignment custody not only will safeguard the public interest, but will exert a significant independent influence on the police to conform their conduct to announced standards. A police interrogator, like the rest of us, may be more inclined to smile if he knows his picture is being taken.

Sheldon H. Elsen & Arthur Rosett, *Protections for the Suspect under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 666 (1966).

"Videotaping not only encourages fairer treatment of suspects during custodial interrogation, it also offers suspects greater protection against the possibility of a wrongful conviction based on a false confession to police."<sup>127</sup> Electronic recording of interrogations, points out Professor Leo, would help identify the police pressures and techniques that give rise to two types of false confessions: (a) those that arise when a suspect furnishes the police with false information in order to end the pressure of the interrogation sessions; and (b) those that occur when the pressures of interrogation "cause an innocent person to temporarily internalize the message(s) of his interrogators and falsely believe himself to be guilty."<sup>128</sup>

Five years *before* the *Miranda* case was decided, ACLU lawyer Bernard Weisberg published a highly influential article on police interrogation (based on a paper he delivered a year earlier at an International Conference on Criminal Law Administration held at Northwestern University Law School), an article that injected the idea of recording police questioning "from start to finish" into the legal literature:

Measured by legal standards, the most unique feature of police station questioning is its characteristic secrecy. . . . Secrecy is not the same as the privacy which interrogation specialists insist is necessary for effective questioning. . . .

No other case comes to mind in which an administrative official is permitted the broad discretionary power assumed by the police interrogator, together with the power to prevent objective recordation of the facts. . . . If the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground. . . .

Secrecy should be prohibited. The method must be comprehensive and complete. Many of the various proposals to use sound recordings or motion picture cameras deal only with admissions which the prosecution wishes to use in evidence. To be effective, the rule should require a record from start to finish of any interrogation in a police station sealed and certified by an independent observer of the entire proceeding. The subject need not be aware of the presence of the observer or the recording equipment.<sup>129</sup>

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<sup>127</sup> Leo, *supra* note 107, at 689.

<sup>128</sup> *Id.* at 691-92.

<sup>129</sup> Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View* (1961), in *POLICE POWER AND INDIVIDUAL FREEDOM* 153, 179-80 (Claude R. Sowle ed., 1962). As fate would have it, a few years after he wrote this article, Mr. Weisberg wound up arguing the case for Danny Escobedo in the Supreme Court as *amicus curiae*. In his 1961 article, Weisberg had made very extensive use of various interrogation manuals. He did the same in his *Escobedo* brief, maintaining that these manuals "are invaluable because they vividly describe the kinds of interrogation practices which are accepted as lawful and proper under the best current standards of professional police

Only a year before *Miranda* was handed down, building on Mr. Weisberg's article, I myself maintained:

In the long run, no statute, court rule, or court decision pertaining to warnings or waivers will suffice—for the same reason that the flood of appellate opinions on 'involuntary' confessions have not sufficed—until police interrogation is stripped of its "most unique feature . . . its characteristic secrecy."<sup>130</sup>

As we have seen, however,<sup>131</sup> although the Court had been plagued by "swearing contests" in dozens of confession cases, and although the Court went to the very edge of requiring tape recording in *Miranda*—noting that since the State "has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden [of establishing a valid waiver of rights] is rightly on its shoulders"<sup>132</sup>—it failed to impose a taping requirement on law enforcement. This is not the only time the *Miranda* Court failed to "follow through" on its own principles.

To take another example: after noting that "a once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice,"<sup>133</sup> the Court, "implement[ed] this insight by merely requiring another once-stated warning concerning the right to counsel."<sup>134</sup> The Court could have done better, continues Professor Schulhofer, "by requiring initial consultation with an attorney or friend, or even by mandating that warnings and waivers take place in the presence of a neutral magistrate who could break the wall of isolation and hostility surrounding the suspect."<sup>135</sup>

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work." Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioner, *Escobedo v. State of Illinois*, 84 S. Ct. 1758 (1964) (No. 615).

At the same international conference in which Mr. Weisberg participated, the renowned British scholar Glanville Williams raised "the possibility of providing for the mechanical recording of confessions." Glanville Williams, *Police Interrogation Privileges and Limitations under Foreign Law: England* (1961), in *POLICE POWER AND INDIVIDUAL FREEDOM* 185, 191 (Claude R. Sowle ed., 1962).

<sup>130</sup> Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* in *CRIMINAL JUSTICE IN OUR TIME* 1, 85–86 (A.E. Dick Howard ed., 1965) (quoting from Weisberg's article).

<sup>131</sup> See *supra* text following note 42.

<sup>132</sup> *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

<sup>133</sup> *Id.* at 469–70.

<sup>134</sup> Schulhofer, *supra* note 20, at 881.

<sup>135</sup> *Id.* Professor Schulhofer also points out that the Court could have adopted the ACLU position and insisted on the presence of an attorney during interrogation, see *id.*, but I am fairly confident that Chief Justice Warren, a former prosecutor and law enforcement interrogator, did not want or seriously consider this alternative.

It is not easy to understand what Frank Allen has called “the curiously tentative posture” of the *Miranda* opinion<sup>136</sup>—its failure to follow its own convictions—unless and until one keeps in mind that in 1966 the Warren Court was probably barely able (or perceived itself as barely able) to go as far as it did. It seems the Court was so closely divided in *Miranda* that, according to one justice who attended the March, 1966 conference on *Miranda*, if FBI agents had not been informing suspects of their rights for many years,<sup>137</sup> there might not have been a landmark *Miranda* decision.<sup>138</sup>

At this point, I cannot help recalling an observation by Zechariah Chafee more than a half-century ago. Defending Justice Holmes against sharp criticism by the philosopher Alexander Meiklejohn, Chafee pointed out:

After all, a judge who is trying to establish a doctrine which the Supreme Court will promulgate as law cannot write like a solitary philosopher. He has to convince at least four [other people] in a specific group and convince them very soon.<sup>139</sup>

D. *What if It Turns Out that Most Suspects Will Talk to the Police Despite the Warnings, Simply Because They can't Resist Telling Their Stories?*

I do not deny that a significant number of suspects would waive their rights and talk to the police even if the police fully complied with *Miranda*. A significant number would do so “because at some level they *want* to talk to police.”<sup>140</sup> I believe, however, that not nearly as many would talk as do now. But one of the leading commentators in this area, George Thomas, disagrees.

After studying more than 200 court opinions drawn from Westlaw, an “admittedly imperfect source,”<sup>141</sup> Professor Thomas concludes:

[Many suspects] talk . . . because [they] *want* to tell their story, because they think they can skillfully navigate the shoals of police interrogation and arrive safely on the other shore . . . .

. . . As long as suspects think they are better off trying to persuade police that they are not guilty, they will continue to talk to police.

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<sup>136</sup> Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. REV. 518, 537.

<sup>137</sup> Although the FBI warnings were similar to the *Miranda* warnings in several respects, they were not as extensive. See *supra* note 52.

<sup>138</sup> See *supra* text at note 55 and accompanying note.

<sup>139</sup> Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 901 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).

<sup>140</sup> Thomas, *supra* note 66, at 1999.

<sup>141</sup> *Id.* at 1962. As Professor Thomas notes, a “distorting effect” in his study “is the series of ‘filters’ that distort the reality of what happened in the interrogation room.” *Id.* at 1963.

*Miranda* provides knowledge that it *might* not be in a suspect's best interests to talk to police. But this knowledge is meaningless as long as suspects are willing to take the chance that it *is* in their best interests to talk.<sup>142</sup>

Of course, one "should not . . . assume that something has necessarily gone wrong if the choice is made to speak."<sup>143</sup> "Conscience, remorse, even calculation can lead without coercion to confession."<sup>144</sup> As Professor Schulhofer has observed, "the Fifth Amendment protects suspects only against state-orchestrated compulsion, not against their own poor judgment."<sup>145</sup>

I believe that in a substantial number of the cases Professor Thomas studied, the court opinions he worked from "filtered out" the detectives' impermissible "confidence game" tactics (impermissible as long as *Miranda* is on the books).<sup>146</sup> But I can not prove it. I could be wrong.

Assuming *arguendo* that Professor Thomas is right, that "the *Miranda* Court was naive if it thought that a set of formal warnings could change story-telling behavior,"<sup>147</sup> does it follow that *Miranda* should be overruled? I think not.

Although there is general agreement that "the overwhelming majority" of custodial suspects waive their *Miranda* rights,<sup>148</sup> this is not the whole picture. As critics of *Miranda* will be quick to point out, a 1996 study by Richard Leo<sup>149</sup> (and earlier studies as well<sup>150</sup>) reveals that custodial suspects with felony records are three or four times as likely to invoke their rights than those with no prior record. (Professor Stuntz calls suspects who fall into this category "Silent Types."<sup>151</sup>)

In a more recent article, however, Richard Leo (who probably knows more about the dynamics of police interrogation than anybody else in academia) and his co-author, Welsh White, advise us that "[e]ven if *Miranda* were abolished" the police would be "unlikely" to loosen the tongues of the Silent Types:<sup>152</sup> "Taken as a group, suspects who assert their *Miranda* rights may be unlikely to make incriminating statements to the police under any circumstances, because they have been hardened by exposure to the criminal justice system."<sup>153</sup> In the short term, at

<sup>142</sup> *Id.* at 1999–2000.

<sup>143</sup> MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 5.01, Commentary at 172 (A.L.I., Tentative Draft No. 1 (1966)).

<sup>144</sup> *Id.* at 171.

<sup>145</sup> Schulhofer, *Practical Effect*, *supra* note 64, at 562.

<sup>146</sup> Thomas, *supra* note 66, at 1962.

<sup>147</sup> *Id.* at 2000.

<sup>148</sup> Leo & White, *supra* note 64, at 468.

<sup>149</sup> See Leo, *supra* note 107, at 654–55.

<sup>150</sup> See *id.* at 655.

<sup>151</sup> Stuntz, *supra* note 124, at 982.

<sup>152</sup> Leo & White, *supra* note 64, at 469.

<sup>153</sup> *Id.* Leo and White agree with David Simon, who observes: "[T]he professionals say

least, add Leo and White, “many (if not most)” of the suspects with prior felony records “would be aware, even in the absence of any *Miranda* warnings, of their Fifth Amendment rights to terminate interrogation.”<sup>154</sup> But if *Miranda* were abolished, would custodial suspects *have* any “Fifth Amendment rights to terminate interrogation”?

The answer is not clear. As I have maintained elsewhere, a good argument may be made that, as the due process/totality of circumstances/voluntariness test had evolved by the time of *Miranda*, “[it] would have . . . prohibited, at the least, the use of statements that were the product of any stationhouse questioning in the face of *repeated* expressions by the suspect of unwillingness to talk to the police until first consulting with a lawyer.”<sup>155</sup>

Whether, if *Miranda* were abolished, a custodial suspect would have a right to terminate police questioning is only one of many issues that would have to be raised by such an event. For example, the failure to require the police to give any warnings<sup>156</sup> does not mean that a custodial suspect could not ask questions about

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nothing. No alibis. No explanations. No expressions of polite dismay or blanket denials.” SIMON, *supra* note 101, at 198.

<sup>154</sup> Leo & White, *supra* note 64, at 469.

<sup>155</sup> Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 389 (2001).

I realize that *Crooker v. California*, 357 U.S. 433 (1958), seems to refute my claim that by the mid-1960s, the due process-voluntariness test had progressed to the point that police questioning of a suspect after denying his requests to contact a lawyer would have rendered the resulting confession “coercive” or “involuntary.” But, in *Haynes v. Washington*, 373 U.S. 503 (1963), in the course of holding a confession “coercive,” the Court highlighted the fact that the suspect had asked the police several times to allow him to call his wife, only to be told he would not be permitted to do so until he confessed. Repeated denials of a suspect’s request to contact a *lawyer*, as in *Crooker*, seem more likely to underscore the intimidating nature of incommunicado detention than repeated denials of a suspect’s request to contact his spouse. Thus, I do not believe one can reconcile *Haynes* with *Crooker*. Justice Tom Clark did not think so either. He wrote the opinion of the Court in *Crooker*, but filed an angry dissent in *Haynes*.

<sup>156</sup> Although no longer required to do so, some police departments (perhaps many) would continue to advise people of their rights because “[e]ven without *Miranda*, an important factor in determining where a confession was voluntary would be whether the warnings had been given.” Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1386 n.283 (1977). But the odds are high that they would not be *the same* *Miranda* warnings, but some abbreviated or diluted version. If so, this would probably only contribute to the general confusion.

Professor Israel is certainly right that even if *Miranda* were abolished, whether a custodial suspect was advised of his rights would still be an important factor in determining the admissibility of a confession. Writing for the Court in *Davis v. North Carolina*, discussed *supra* in the text at notes 21–24, Chief Justice Warren observed:

[T]hat a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of the interrogation, as is now required by *Miranda*, is a *significant factor* in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness.

*Davis v. North Carolina*, 384 U.S. 737, 740–41 (1966) (emphasis added).



her rights on her own initiative. (It would hardly be surprising if a person who had been watching TV detective shows for many years did so.)

Suppose a custodial suspect were to ask a police officer if he could (or would) *prevent her* from communicating with a lawyer until she answered his questions? How should he respond? Could he say he *would prevent her* without jeopardizing the admissibility of any resulting confession?

Or suppose a custodial suspect were to ask a police officer whether she *had to* answer his questions or whether the police officer had *a right* to an answer? Again, how should the officer respond? (Very carefully.) A good argument may be made that, as it had evolved by the time of *Miranda*, the “voluntariness” test would have barred the admissibility of any statements made by one who had been told by the police that she must answer their questions or that they had a right to an answer.

Dissenting in *Escobedo* (as he was to dissent in *Miranda*), Justice White recognized that under the due process-voluntariness test, if a suspect “is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him.”<sup>157</sup> Decades later, Professor Joseph Grano, the most prominent *Miranda* critic of his time, put it even more strongly than Justice White had: Because the police “may not deceive defendants about the nature or scope of their legal rights,” “it would violate due process to tell suspects that they are obligated to answer questions . . .”<sup>158</sup>

It is possible that in a world without *Miranda* the Court might permit the officer to respond: “I can’t answer that question” or “I can’t answer any of your questions.” We can not be sure. Perhaps the only thing about which we can be fairly confident is that the abolition of *Miranda* would cause a great deal of confusion and uncertainty—perhaps even more than *Miranda* did in the first place.

Of course, avoiding confusion is hardly the only reason, or even the primary one, for not abolishing *Miranda*. As Professor Leo has observed:

*Miranda* has exerted a civilizing effect on police behavior and in so doing has professionalized the interrogation process in America. . . . [T]he *Miranda* decision has transformed the culture—the shared norms, values, and attitudes—of police detecting in America by fundamentally reframing how police talk about and think about the process of custodial interrogation. . . .

In the world of modern policing, *Miranda* constitutes the moral and legal standard by which interrogators are judged and evaluated. . . . Indeed, virtually all police officers and detectives today have known no law other than *Miranda*.<sup>159</sup>

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<sup>157</sup> *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964) (White, J., joined by Clark and Stewart, JJ., dissenting).

<sup>158</sup> GRANO, *supra* note 124, at 114.

<sup>159</sup> Leo, *supra* note 107, at 670–71. On the weekend of April 22, 2006, a criminal procedure

Even if a custodial suspect knows all his rights, he needs to know, as Professor Stephen Schulhofer has put it, “whether the *police* know his rights. And he needs to know whether the police are prepared to *respect* those rights.”<sup>160</sup>

To many, “*Miranda* may seem a mere symbol.”<sup>161</sup> However, to quote Schulhofer again, “the symbolic effects of criminal procedural guarantees are important; they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled.”<sup>162</sup> Even one of the landmark case’s strongest critics recognizes that *Miranda* may be seen as “a gesture of government’s willingness to treat the lowliest antagonist as worthy of respect and consideration.”<sup>163</sup>

Abolishing *Miranda* would be symbolic, too. “And surely the symbolic message that such a decision would seem to send—that police can disregard constitutional rights when interrogating criminal suspects—would cause a backlash of resentment against, and more distrust of, American police.”<sup>164</sup>

It is noteworthy, I believe, that in a tribute to Professor Fred Inbau, for many years the great champion of police interrogation, Professor Ronald Allen, Inbau’s colleague, recalled that Inbau balked at explicitly overruling *Miranda*. As did

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conference was held at the Harvard Law School. When a panelist minimized the significance of *Miranda*, a person in the audience (who turned out to be a fairly high-ranking DOJ lawyer) related the following tale: when certiorari was granted in *Dickerson v. United States* (2000), a group of DOJ lawyers met to discuss whether to defend *Miranda*’s constitutional status or to defend the constitutionality of the anti-*Miranda* statute that was ultimately invalidated.

At some point in the discussion, several DOJ lawyers who had previously been prosecuting attorneys or defense lawyers in the South urged their colleagues to defend *Miranda*. According to my notes, what the person at the Harvard conference told us was that these DOJ lawyers emphasized that “the only thing standing between black criminal suspects and oppressive interrogation tactics by southern police was *Miranda*.”

Because the person who spoke at the Harvard conference told me later he/she did not wish to be identified, I shall not do so. (However, I have considerable difficulty understanding how a person who speaks at a conference open to the public can expect to remain anonymous.) Three people who participated in the Harvard conference, Judge Gerard Lynch and Professors Richard Leo and George Thomas, told me that they concur in my account of what the unidentified DOJ lawyer said.

<sup>160</sup> Schulhofer, *supra* note 34, at 447.

<sup>161</sup> *Id.* at 460.

<sup>162</sup> *Id.*

<sup>163</sup> Caplan, *supra* note 29, at 1471.

<sup>164</sup> Leo, *supra* note 107, at 680. I agree with Professor Leo that even if warnings were no longer required or given, suspects would still have “rights.” Three years before *Miranda* was decided, in *Haynes v. Washington*, 373 U.S. 503, 511 (1963), the Court pointed out that the defendant had not been advised of “his *right* to remain silent” or “told of his *rights* respecting consultation with an attorney.” (emphasis added) In 1949, Justice Felix Frankfurter, author of the principal opinions in three confession cases decided the same day, noted that in one of the cases the defendant was “without advice as to his constitutional *rights*.” *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (emphasis added). In context, this could only have meant the right to counsel and the right to remain silent. In a famous opinion, Justice Jackson noted that one factor stood out in the three confession cases then before the Court: “[t]he suspect neither had nor was advised of his *right* to get counsel.” *Watts*, *supra*, at 59 (Jackson, J., concurring in the result) (emphasis added).

Allen himself, Inbau “feared that [overruling *Miranda*] would be taken as a symbol by the police that, so to speak, all bets were off, and a return to the days of the third degree was acceptable.”<sup>165</sup>

I began this section of the paper by asking a series of questions, including: “What good does *Miranda* do?” Perhaps a more appropriate question would be: “At this point in time, what good would it do (and how much harm would it cause) to *abolish Miranda*?”

#### V. WILLIAM REHNQUIST AND *MIRANDA*<sup>166</sup>

Even before his ascension to the Supreme Court, William Rehnquist left no doubt about his unhappiness with *Miranda*. On April 1, 1969, when he had been Assistant Attorney General in charge of the Office of Legal Counsel for fewer than ninety days, Rehnquist sent a memorandum to John Dean (of Watergate fame), who was then the Associate Deputy Attorney General. The memorandum charged that “there is reason to believe” that the Warren Court had tilted the scales of justice too far in favor of criminal suspects and recommended that the President appoint a national commission “to determine whether the overriding public interest in law enforcement requires a constitutional amendment.”<sup>167</sup> Although he complained about a number of recent cases, Rehnquist directed his heaviest fire at *Miranda*.

At one point he maintained: “The Court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible unless an elaborate set of warnings be given which is very likely to have the effect of preventing a defendant from making any statement at all.”<sup>168</sup> At another point, Rehnquist complained, as have other critics of *Miranda*, that “believing that the poor, disadvantaged criminal defendant should be made just as aware of incriminating himself as the rich, well-rounded criminal defendant,” the Court “has undoubtedly put an additional hurdle in the way of convicting the guilty.”<sup>169</sup>

<sup>165</sup> Ronald J. Allen, *Tribute to Fred Inbau*, 89 J. CRIM. L. & CRIMINOLOGY 1271, 1273 (1999).

<sup>166</sup> At this point, I am drawing freely from Yale Kamisar, Dickerson v. United States: *The Case that Disappointed Miranda's Critics—and Then Its Supporters*, in THE REHNQUIST LEGACY 106 (Craig Bradley ed., 2006). See also Yale Kamisar, *Miranda's Reprieve: How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact*, A.B.A. J., June, 2006, at 48.

<sup>167</sup> Memorandum from William Rehnquist, Assistant Attorney General, Office of Legal Counsel, to John W. Dean III, Associate Deputy General (Apr. 1, 1969), at 2 [hereinafter Rehnquist Memorandum]. The memorandum was marked “administratively confidential,” which, according to Dean, “kept it locked up for many years.” JOHN W. DEAN, THE REHNQUIST CHOICE 268 (2001). I am indebted to Professor Thomas W. Davies of the University of Tennessee College of Law for providing me with a copy of the memorandum.

<sup>168</sup> Rehnquist Memorandum, *supra* note 167, at 5.

<sup>169</sup> *Id.*

Nothing came of the memorandum because Attorney General John Mitchell was not sure the Nixon Administration could control the kind of national commission contemplated by Rehnquist. However, Mitchell certainly became well aware of Rehnquist (three years later, he supported him strongly for the Supreme Court) and President Richard Nixon probably became quite aware of him as well.

Congress, too, was upset with *Miranda*. A year before Rehnquist had written his anti-*Miranda* memo, an angry Congress had enacted legislation purporting to “overrule” *Miranda* and to reinstate the “voluntariness”/“totality-of-the-circumstances” rule as the sole test for the admissibility of confessions in federal prosecutions.<sup>170</sup> Most commentators thought the statute (commonly known as “Section 3501” because of its designation under Title 18 of the U.S. Code) was unconstitutional.<sup>171</sup> However, in June, 1969, only two months after Rehnquist sent Dean his anti-*Miranda* memo, Attorney General Mitchell authorized the sending of a Department of Justice (DOJ) memorandum to all United States Attorneys, a memo that made the best case up to that point for the constitutionality of Section 3501.<sup>172</sup>

It is unclear who wrote the DOJ memo. However, given his position in the Department of Justice and his earlier memo sharply criticizing *Miranda*, Rehnquist seems an obvious choice.

The DOJ memorandum emphasized (as Justice Rehnquist was to do five years later, when he wrote the opinion of the Court in *Michigan v. Tucker*<sup>173</sup>) that the *Miranda* Court itself had recognized that the Constitution does not require adherence to “*any particular* solution for the inherent compulsions of the interrogation process” (emphasis added), only compliance with “*some ‘system’* to safeguard against the inherently compelling circumstances” (emphasis in the original) that jeopardize the privilege.<sup>174</sup> Therefore, continued the DOJ memorandum, the *Miranda* warnings “are not themselves constitutional absolutes.”<sup>175</sup>

But this is quite misleading. The *Miranda* warnings are not “constitutional absolutes” in the sense that *another* set of procedural safeguards, *another* system to protect against the inherently compelling circumstances of custodial interrogation (perhaps a system of audio taping or videotaping police questioning and a modified set of warnings), *might* constitute a suitable substitute. However, *absent* another set of procedural safeguards, the *Miranda* warnings *are* required.

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<sup>170</sup> See generally Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883 (2000).

<sup>171</sup> Many years later, a 7-2 majority did hold the statute unconstitutional. See *Dickerson v. United States*, 530 U.S. 428, 435 (2000).

<sup>172</sup> Memorandum from the Department of Justice to the United States Attorneys (June 11, 1969), 5 Crim.L.Rep. (BNA) 2350 (1969) [hereinafter DOJ Memorandum].

<sup>173</sup> 417 U.S. 433, 435 (1974).

<sup>174</sup> DOJ memorandum, *supra* note 172, at 2351.

<sup>175</sup> *Id.* at 2351–52.

Unfortunately, Section 3501 failed to provide any suitable substitute for *Miranda*. When Congress enacted the statutory provision, it simply replaced *Miranda* with the old “voluntariness” test—the very test that the *Miranda* Court had found woefully inadequate.

Whether or not they are the same person, both the author of the 1969 DOJ memorandum disparaging *Miranda*, and the author of the 1974 opinion in *Michigan v. Tucker* disparaging *Miranda*, overlooked some of its key language:

*[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [the Miranda warnings] must be observed. . . .*

. . . . [T]he Constitution does not require any specific code of procedure for protecting the privilege against self-incrimination during custodial interrogation . . . so long as they are fully as effective as those described above [the *Miranda* warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.<sup>176</sup>

The *Tucker* case allowed the introduction of testimony of a witness whose identity had been discovered as a result of the questioning of a defendant who had not received a complete set of warnings. Another case that built on *Tucker*, *New York v. Quarles*<sup>177</sup> (another Rehnquist opinion), recognized a “public safety” exception to the need for the *Miranda* warnings, and thus held admissible both the suspect’s statement made in response to a question by the police who had chased him into a supermarket—“the gun is over there”—and the gun found as a result of the statement. Still another case that relied heavily on *Tucker* was *Oregon v. Elstad*<sup>178</sup> (an opinion by Justice Sandra Day O’Connor), where the fact that the police had obtained a statement from the defendant when they questioned him without giving him the required *Miranda* warnings did not bar the admissibility of a later statement obtained at another place when, this time, the police *did* comply with *Miranda*.

*Tucker* and its progeny led critics of *Miranda* to hope that some day the Court would overrule *Miranda* or uphold the constitutionality of Section 3501, the federal statute that purported to abolish *Miranda*. As it turned out, the Court did neither.

Instead, Chief Justice Rehnquist performed a remarkable turnaround. In *Dickerson v. United States*,<sup>179</sup> he wrote the opinion of the Court striking down the

<sup>176</sup> *Miranda*, 384 U.S. at 467, 490 (emphasis added).

<sup>177</sup> 467 U.S. 649, 659 (1984).

<sup>178</sup> 470 U.S. 298 (1985), discussed *supra* in the text at notes 90–96.

<sup>179</sup> 530 U.S. 428 (2000).

anti-*Miranda* statute because “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”<sup>180</sup>

Rehnquist conceded that there was *some* language in *some* of the Court’s opinions supporting the view that the protections announced in *Miranda* are not constitutionally required—referring to what he himself had said about *Miranda* in the *Tucker* and *Quarles* cases<sup>181</sup>—and then quickly moved on. I doubt that any Supreme Court justice has ever dismissed his own majority opinions more summarily or nonchalantly.

#### VI. WHY DID REHNQUIST VOTE TO UPHOLD THE CONSTITUTIONALITY OF *MIRANDA*?

Why, after writing the opinion in *Tucker*, which seemed to establish the foundation for overruling *Miranda* (or upholding the federal statute purporting to abolish it), did Chief Justice Rehnquist come to the rescue of that much-criticized decision in the year 2000? Many explanations have been offered.

For one thing, the Chief Justice may have decided to vote with the majority so that he could assign the opinion to himself rather than let the opinion go to someone like Justice John Paul Stevens, probably the strongest champion of *Miranda* then on the Court. (When the Chief Justice is in dissent, the senior justice in the majority, here Justice Stevens, assigns the opinion of the Court.) Many of those who subscribe to this view doubt that Rehnquist would have voted in favor of *Miranda* if, not counting himself, the vote would have been 4-4, rather than the actual vote, 6-2. There are, however, a number of other possible reasons for Rehnquist’s action in the *Dickerson* case.

First, Rehnquist might have regarded *Dickerson* as an occasion for the Court to maintain its power against Congress, i.e., “stay off our turf.”<sup>182</sup> He might have considered Section 3501 “a slap at the Court.” “[I]f any Court was likely to slap back,” observe Professors Michael Dorf and Barry Friedman, “it was this one.”<sup>183</sup>

Second, the Chief Justice might have been concerned (as some of *Miranda*’s strongest critics were)<sup>184</sup> that the police would view the abolition of *Miranda* as a signal that they could return to the “old days” of police interrogation.

Alternatively, Rehnquist might have decided that the best outcome would be a compromise, one that reaffirmed *Miranda*’s constitutional status (thereby invalidating the statute that purported to abolish it), but preserved all the qualifications and exceptions the case had acquired since the Warren Court had disbanded in the late 1960s. Why would Rehnquist, a severe critic of *Miranda* in

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<sup>180</sup> *Id.* at 437. Only Justices Scalia and Thomas dissented.

<sup>181</sup> See *id.* at 436-37.

<sup>182</sup> See Craig M. Bradley, *Behind the Dickerson Decision*, 36 TRIAL, Oct. 2000, at 80.

<sup>183</sup> Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 72.

<sup>184</sup> See *supra* text at note 165.

his early years on the Court, favor a compromise? Perhaps because he was interested in assuming an increasingly large leadership role as Chief Justice, as opposed to his more partisan days as Associate Justice. Perhaps, too, he had reached the conclusion that in the year 2000, getting rid of the nation's most famous criminal procedure case would have caused more harm than good.

For one thing, three-and-a-half decades of *Miranda* jurisprudence would have been wiped out. In the thirty-four years since *Miranda* had been handed down, the Court had decided nearly sixty cases involving a host of *Miranda* issues. Why erase all this case law when *Miranda* had been so weakened by various limitations and qualifications that the police were now able to live with it fairly comfortably?

Finally, as discussed at considerable length earlier,<sup>185</sup> overturning *Miranda*—and falling back solely on the old, but ever-changing, voluntariness test—would have caused a great deal of confusion (and a good deal of work for the Court).

#### VII. WHY, ALTHOUGH ITS CONSTITUTIONALITY HAS BEEN REAFFIRMED, *MIRANDA* RECENTLY SUFFERED A SEVERE BLOW

As already pointed out, prior to *Dickerson*, the Supreme Courts that replaced the Warren Court carved out various exceptions to *Miranda*. For example, the Burger and Rehnquist Courts indicated that the “fruit of the poisonous tree” doctrine—traditionally used to exclude evidence derived from, or “the fruits of,” an illegal search—did not apply when the police obtained evidence derived from a statement obtained without giving the *Miranda* warnings.<sup>186</sup> To a large extent, these pre-*Dickerson* cases were based on the premise that, unlike a violation of the Fourth Amendment, a violation of the *Miranda* warnings was not a violation of constitutional dimensions and therefore not worthy of, for example, the fruit-of-the-poisonous tree doctrine.

Most of the exceptions the Burger and Rehnquist Courts had made to *Miranda* were based on the assumption that *Miranda* was not really a constitutional decision. Civil libertarians hoped that these exceptions would no longer be “good law” after *Dickerson*. The Supreme Court has now made it clear, however, that what it reaffirmed in *Dickerson* was not the *Miranda* doctrine as it burst onto the scene in 1966, but rather *Miranda* with all its post-Warren Court exceptions “frozen in time.”

Shortly after *Dickerson* revived *Miranda*'s constitutional status, *United States v. Patane*<sup>187</sup> reached the Supreme Court. Without complying with *Miranda*, a detective had questioned Mr. Patane about a pistol he was supposed to own. Mr.

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<sup>185</sup> See *supra* text accompanying notes 155–59.

<sup>186</sup> See *supra* text at notes 90–96.

<sup>187</sup> 542 U.S. 630 (2004). For close analyses of *Patane* and a companion case, *Missouri v. Seibert*, 542 U.S. 600 (2004), see Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 “Poisoned Fruit” Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004); William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813 (2005).

Patane told the detective where he had put the pistol and the detective soon found it. Relying heavily on pre-*Dickerson* cases, the Supreme Court barred the use of the statement but upheld the admissibility of the pistol. A majority of the Court seemed to attach no significance whatsoever to the fact that only a few years earlier the Court had told us that the *Miranda* Court had “announced a constitutional rule.”<sup>188</sup> If so, why was the *Miranda* rule not entitled to the “fruits doctrine” no less than the search-and-seizure exclusionary rule?

Nietzsche once observed that the commonest stupidity consists in forgetting what one is trying to do. One of the things the *Miranda* Court was certainly trying to do was to get police interrogators to stop utilizing the methods they had been using for a long time in order, in effect, to compel suspects to incriminate themselves—by implying that they, the police, have a *right* to an answer and that the suspect *had better answer or else* matters would be so much the worse for him. The now-familiar warnings were designed to negate these misleading assumptions or impressions. How can we expect (or even hope) to take away the police’s incentive to engage in pre-*Miranda* tactics if we exclude *only* the incriminating statements obtained in violation of the *Miranda* rules, but permit the use of *everything else* these statements bring to light?<sup>189</sup>

The principal opinion in *Patane* was written by Justice Thomas, one of the two *Dickerson* dissenters. As Professors Dressler and Michaels aptly describe it:

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<sup>188</sup> See *Dickerson v. United States*, 530 U.S. at 428, 437 (2000) (“This case . . . turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.”).

<sup>189</sup> Have I overlooked the companion case to the *Patane* case, *Missouri v. Seibert*, 542 U.S. 600 (2004)? I think not. In *Seibert*, a 5-4 majority *did* exclude a so-called second confession, one obtained after the police had intentionally used a two-stage interrogation technique designed to undermine the *Miranda* warnings. But the case grew out of an extraordinary set of circumstances. For example, the police interrogator admitted that, as he had been trained to do, he had deliberately failed to give any warnings at the first questioning session. The officer also conceded that the statement ultimately obtained and admitted into evidence (the one obtained after the warnings had been given for the first time at the second session) had been “largely a repeat” of the statement the police had elicited prior to giving any warnings. *Patane* represents the general rule; *Seibert* is the striking exception.

Justice Anthony Kennedy cast the deciding vote in *Seibert*. However, although he concurred in the judgment, he took no more cognizance of *Dickerson* than he had when he concurred in the result in *Patane*. And in *Seibert*, too, he had nice things to say about *Elstad*, maintaining that it “was correct in its reasoning” and “reflect[ed] a balanced and pragmatic approach to enforcement of the *Miranda* warning.” *Seibert*, 542 U.S. at 620. I think it fair to say that Justice Kennedy left no doubt that in the typical “second confession” case he would find the statement admissible.

As I have observed elsewhere, Kamisar, *supra* note 187, at 108:

The failure to comply with *Miranda* was so deliberate and so flagrant [in *Seibert*] that an 8-1 or 7-2 ruling in favor of the defense would not have been surprising. The fact that the vote on these extreme facts was 5-4 and that the derivative evidence was held inadmissible only because of Justice Kennedy’s somewhat grudging concurring opinion is significant evidence of the low state to which *Miranda* has fallen.



[Justice Thomas] delivered an opinion that treated *Dickerson* almost as if it did not exist. Justice Thomas, in pre-*Dickerson* language, characterized the “*Miranda* rule” as a “prophylactic employed to protect against violations of the Self-Incrimination Clause.” And, citing *Elstad*, [Justice Thomas] stated that prophylactic rules, including *Miranda*, “necessarily sweep beyond the actual protections of the Self-Incrimination Clause.”<sup>190</sup>

Justice Scalia joined Justice Thomas’s opinion in *Patane*. That was to be expected. Scalia was the other dissenter in *Dickerson*. Astonishingly, however, Chief Justice Rehnquist, who had authored the majority opinion in *Dickerson*, also joined Justice Thomas’s *Patane* opinion. Rehnquist, too, it seems, was willing to proceed almost as if his opinion for the Court in *Dickerson* did not exist.<sup>191</sup>

*Patane* corroborates Donald Dripps’s comment that the *Dickerson* opinion was “intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*’s continued vitality”.<sup>192</sup>

As *Dickerson* demonstrates, a majority of the Court is unwilling to overrule *Miranda* (or to let Congress do so). As *Patane* makes plain, however, a majority is also unwilling to take *Miranda* seriously. That is the sad reality—forty years after *Miranda*.

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<sup>190</sup> DRESSLER & MICHAELS, *supra* note 18, at 520.

<sup>191</sup> Some of those puzzled by Chief Justice Rehnquist’s surprising behavior in *Patane* (surprising because of his opinion in *Dickerson*, which, in turn, was surprising considering his earlier opinion in *Tucker*) may be satisfied by the explanation offered by one of the Chief’s former law clerks, R. Ted Cruz (now the Solicitor General of Texas). In a tribute to the Chief, written shortly after the latter’s death, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10, 14–15 (2005), Cruz suggested that Rehnquist voted with the majority so that he could assign the opinion to himself rather than let Justice John Paul Stevens write the opinion of the Court. Stevens, points out Cruz, might have underscored the constitutional nature of *Miranda*, something Rehnquist did not dwell on. According to Cruz, when Rehnquist wrote his *Dickerson* opinion, he took pains not to reject the characterization of *Miranda* as “prophylactic,” something Justice Stevens might well have done. Moreover, although Rehnquist did rule that the statute purporting to overturn *Miranda* was invalid, he did not spell out why this was so and, according to Cruz, Rehnquist’s implicit message was: “[D]o not ask why [the statute was unconstitutional], and please, never, ever, ever cite this opinion for any reason.” *Id.* at 15.

However, in *Patane* Justice Thomas *did* cite *Dickerson* for a reason—to maintain that the *Dickerson* Court’s “reliance” on decisions carving out exceptions to *Miranda* “demonstrat[ed] the continuing validity of those decisions.” 542 U.S. at 640.

For a detailed and insightful discussion of Chief Justice Rehnquist’s “strategic behavior” in *Dickerson*, see Daniel M. Katz, *Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight in Dickerson v. United States*, 22 J.L. & POL. 303 (2006).

<sup>192</sup> Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Miranda, Dickerson, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 3 (2001) (emphasis added).

